Supreme Court, U.S.
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In The

Supreme Court of the United States

YEWHALASHET ABEBE,

Petitioner,

v.

ERIC HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals ("BIA") held that a legal permanent resident ("LPR") who is deportable due to a criminal conviction could seek a discretionary waiver under Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2001, this Court held that such relief remains available after statutory repeal of Section 212(c) (effective April 1, 1997) based on principles of reliance on the existing law at the time a plea of guilty is entered because of the importance of this immigration relief to LPRs with criminal convictions.

In 2005, the BIA abruptly reversed course. Under the BIA's current view, LPRs convicted of certain "aggravated felonies" may seek Section 212(c) relief if they have departed and reentered the United States after their conviction, but they are categorically ineligible for relief if they have never departed the United States. The BIA's new interpretation has led to a circuit split.

The question presented is:

> Whether a lawful permanent resident who is deportable on account of a pre-April 1, 1997 guilty plea to a certain specified "aggravated felony" offense that is also a basis for exclusion, but who did not leave the United States between his conviction and the commencement of removal proceedings, is categorically

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foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Yewhalashet Abebe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The *en banc* decision of the court of appeals (App. 1), as amended, is reported at 554 F.3d 1203. The prior, now vacated, panel decision of the court of appeals, finding Petitioner removable and ineligible for a waiver of deportation under former INA § 212(c) (App. 37), is reported at 493 F.3d 1092. A second, now vacated, panel decision, remanding the case to the Board of Immigration Appeals ("BIA") for reconsideration of the Petitioner's application for relief in the form of withholding of removal (App. 79), is unreported. The final published order of the court of appeals, denying Petitioner's request for rehearing by the full court (App. 92), is reported at 577 F.3d 1113.

The decision of the Immigration Judge, finding Petitioner removable and ineligible for relief from removal (App. 85), is unreported.

The decision of the BIA, affirming the IJ's decision (App. 81), is unreported.

JURISDICTION

The court of appeals entered its judgments on July 9, 2007 (App. 37 and 79), granted rehearing *en banc*, vacated those judgments, and issued a subsequent judgment on January 5, 2009 (App. 1), and denied Petitioner's petition for rehearing by the full court of appeals on August 18, 2009 (App. 92). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

8 U.S.C. § 1227(a)(2)(iii) (2005) provides in relevant part: "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

8 U.S.C. § 1101(a)(43)(A) (2005) provides in relevant part: "The term 'aggravated felony' means . . . sexual abuse of a minor[.]"

Former 8 U.S.C. § 1182(c) (1992) provides in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a

> lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

The Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), provides in relevant part:

> Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended . . . (1) by striking "The first sentence of this" and inserting "This"; and (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

STATEMENT OF THE CASE

Petitioner is a 54-year old citizen of Ethiopia who entered the United States as a refugee and became a lawful permanent resident ("LPR") in 1984. He has

resided and been gainfully employed in the United States since that time, and has never left the United States. He has been in immigration custody since the commencement of his immigration proceedings.

In 1992, Petitioner pled guilty to committing "lewd/lascivious conduct upon a child" in violation of California Penal Code § 288(a) (1992). He was sentenced to one year in jail and three years of supervised probation.[1] In addition, Petitioner was required to register as a sex offender and to provide registration updates to local police within five days of his birthday for each year he remained in California. After serving his sentence, Petitioner's only other contact with the criminal justice system occurred in 2001 when he failed to renew his sex offender registration by the statutory deadline. He was convicted of an offense under California Penal Code § 290(g)(2) (2001) and sentenced to 120 days in jail.

In 2005, the government commenced removal proceedings against Petitioner, asserting that he was deportable because he had been convicted of two crimes involving moral turpitude ("CIMT"), 8 U.S.C.

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[1] Petitioner has always maintained factual innocence to his conviction and asserted that he was provided ineffective assistance of counsel by his public defender during his criminal proceedings. In 1993, he filed a motion to withdraw his guilty plea to the Superior Court of the State of California, which was denied. He subsequently filed a writ of habeas corpus before the Supreme Court of California, which was also denied. He currently has a *pro se* petition for writ of certiorari pending before this Court regarding that denial. *See* Case no. 09-5434.

§ 1227(a)(2)(A)(ii) (2005), and had been convicted of an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii) (2005), namely, the 1992 "sexual abuse of a minor" offense. Petitioner represented himself in his immigration proceedings.

The Immigration Judge ("IJ") dismissed the CIMT charge after the government conceded that Petitioner's failure to update his sex offender registration was not a CIMT. The IJ sustained the aggravated felony charge of removal. App. 86. Petitioner does not contest the finding of removability.

Petitioner sought several forms of relief from removal. One of these forms of relief was a discretionary waiver of inadmissibility authorized by former INA § 212(c) (1992) ("§ 212(c) or "Section 212(c)"), 8 U.S.C. § 1182(c) (1992). Although § 212(c) was repealed in 1996, because Petitioner's 1992 conviction was obtained through a guilty plea, if he "would have been eligible for § 212(c) relief at the time of [his] plea under the law then in effect," he remained so during the removal proceedings. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that Congress did not unmistakably indicate an intention to apply the repeal of § 212(c) retroactively to aliens who may have relied on its availability in deciding whether to forgo their right to a criminal trial). At the time of Petitioner's plea, § 212(c) stated that

> [a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of

> deportation, and who are re-turning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [(establishing classes of aliens to be excluded from admission to the United States)]. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c) (Supp. IV 1992).

On the face of the statute, § 212(c) does not apply to Petitioner because, although he does have a lawful unrelinquished domicile of well over seven years, he is not returning from a temporary overseas journey and is not facing exclusion from admission to the United States under 8 U.S.C. § 1182(a) but, instead, is being deported from within the country under the authority of § 1227(a). However, through a series of long-standing administrative and judicial decisions, grounded in issues of fundamental fairness, equal protection and Congressional acquiescence, the Attorney General's statutory authority to grant relief from exclusion has been interpreted to carry with it a similar authority to grant relief from deportation under certain circumstances. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (finding first that equal protection required the granting of waivers under § 212(c) to persons in deportation proceedings); *see also Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir.

1981) (following *Francis*); *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976) (same).

At Petitioner's March 25, 2005 hearing before the *Matter of Blake* decision, the IJ found that Petitioner is removable for the 1992 aggravated felony, and also found that § 212(c) would be available to waive that conviction assuming Petitioner was not also deportable for the 2001 offense (which the IJ later determined Petitioner was not). On May 10, 2005, however, the IJ held that there was no authority to grant relief to Petitioner because the ground of deportability sustained – aggravated felony sexual abuse of a minor – lacked a sufficiently comparable charge of inadmissibility under § 212(a) pursuant to the BIA's decision in *Matter of Blake*, 23. I. & N. Dec. 722 (BIA 2005), issued approximately one month before Petitioner's final hearing.[2] App. 86. The IJ therefore

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[2] Petitioner also applied for relief under withholding of removal and the Convention Against Torture. The IJ denied these claims on the grounds that Petitioner had been convicted of a "particularly serious crime" and was therefore ineligible for withholding of removal, and that he failed to show that he would be subject to torture if returned to Ethiopia. The BIA did not rule on the claims. In an unpublished memorandum decision, the Ninth Circuit initially granted remand to the BIA to consider whether the IJ applied a legally correct standard to determining whether Petitioner had been convicted of a particularly serious crime. App. 79. The *en banc* court subsequently reversed its decision and found that Petitioner had failed to exhaust his claim to withholding before the BIA and that it did not have jurisdiction over the claim. App. 9.

returned Petitioner's application for § 212(c) relief to him.

Petitioner represented himself during his proceedings before the BIA. On September 30, 2005, the BIA affirmed, relying on *Matter of Blake*, *supra*, and the newly promulgated regulation at 8 C.F.R. § 1212.3(f)(5) (2004). App. 82.

On July 9, 2007, a Ninth Circuit panel denied Petitioner's appeal in regards to his application for a waiver under former INA § 212(c). App. 37. The majority found that Petitioner failed to show that the "comparable grounds" test under *Matter of Blake, supra,* was inconsistent with the INA, inconsistent with the regulations, contrary to agency practice, or violated equal protection or due process. App. 53-66. One judge concurred in the result, but wrote separately to explain that she followed the majority only because of the binding precedent of *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994), in which the Ninth Circuit had denied eligibility under § 212(c) to a noncitizen who was facing deportation based on a ground of deportation that was not "substantially identical" to a ground of exclusion. App. 67-78. She stated that she believed, however, that *Komarenko, supra*, was wrongly decided and should be reconsidered.

The court subsequently granted rehearing *en banc* of the decision to reconsider whether the rationale of *Komarenko, supra*, conflicted with *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

On January 5, 2009, the *en banc* court issued a new decision. App. 1. A six-judge majority overruled *Tapia-Acuna*, *supra*, and found that equal protection did not require that § 212(c) relief was required to be made available to persons in deportation proceedings. App. 1-10. Three judges concurred in the judgment, but wrote separately to state that overruling *Tapia-Acuna*, *supra*, was unnecessary and unwise. App. 11-23. Two judges dissented, and wrote that they would overrule *Komarenko*, *supra*, and follow the Second Circuit in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). App. 23-36.

Petitioner petitioned for rehearing by the full court. App. 92. That petition was denied on August 18, 2009. Seven judges dissented. App. 93-113.

REASONS FOR GRANTING THE PETITION

In a pending petition for certiorari, Jose Erasmo De La Rosa has asked this Court to resolve the conflict among the circuits regarding the legal validity of the BIA's decision in *Matter of Blake*. *See* Pet., *De La Rosa v. Holder* (U.S. Nov. 13, 2009) (No. 09-___). For the reasons discussed here, and because the issues are more fully developed in De La Rosa's petition, and the Court's disposition of De La Rosa's petition would affect the outcome of this matter, the Court should at a minimum hold this case until it has decided whether to grant review in *De La Rosa* and

then dispose of this case consistent with its disposition of *De La Rosa*.

I. History Of Section 212(c) Relief Eligibility

A. Availability Of Discretionary Relief Before 2005

Prior to its repeal in 1996, Section 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c).

This section has long been applicable not only to LPRs who are subject to exclusion under § 1182 (INA § 212) but also to those who, like Petitioner, are deportable due to convictions that would also render them excludable.

Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens re-turning after a temporary absence to an

unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on the Seventh Proviso to grant relief in deportation proceedings involving aliens who had departed and returned to this country after the ground for deportation arose. *See St. Cyr*, 533 U.S. at 294 (citing *Matter of L-*, 1 I. & N. Dec. 1, [5-6 (A.G. 1940)]). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon entry and to grant discretionary relief *nunc pro tunc*. *Matter of L-*, 1 I. & N. Dec. at 5-6.

Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled § 3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso to Section 3. The BIA soon ruled that, like the Seventh Proviso, Section 212(c) permitted relief for LPRs in deportation proceedings who had traveled abroad after their conviction but before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 275 (BIA 1956). The BIA noted that "there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392 (BIA 1955). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal conviction, a

deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Matter of G-A-*, 7 I. & N. Dec. at 275.

The BIA initially refused to permit deportable LPRs who had not traveled abroad after their conviction to seek Section 212(c) relief, which caused eligibility for relief to turn on such a fortuitous factor as whether the applicant traveled abroad since the conviction. *Matter of Arias-Uribe*, 13 I. & N. Dec. 966 (BIA 1971). In 1976, the Second Circuit rejected that distinction, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following . . . conviction" and concluded that

> [r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return.

Id. The BIA and all of the courts of appeals followed *Francis*. *See St. Cyr*, 533 U.S. at 295.

This is the same fundamental issue of equal protection, which was believed to have been resolved three decades ago, that the BIA has now abruptly

violated. Under *Francis*, deportable LPRs who did not depart the United States could only seek Section 212(c) relief if they were in fact in "like circumstances" compared to an otherwise similarly-situated LPR who did leave and return and was thus entitled to seek Section 212(c) relief *nunc pro tunc*. If an LPR was deportable for a conviction that did not make him inadmissible, then he would not have been eligible for Section 212(c) relief *nunc pro tunc* even if he had traveled abroad. There was no irrational distinction in denying relief to such a person. *See, e.g.*, *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

This came to be known as the "comparable ground" or "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings, if the LPR was deportable for a conviction that fell under a "comparable" or "counterpart" exclusion provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the comparable ground rule was satisfied by all but a limited group of LPRs – generally, only those deportable for either certain firearms convictions or entry without inspection. The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of*

Hernandez-Casillas, 20 I. & N. Dec. 262, 282 n.4 (A.G. 1991).

In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") significantly reduced the classes of deportable LPRs permitted to seek Section 212(c) relief. Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (Apr. 24, 1996). AEDPA eliminated 212(c) relief for anyone "deportable" as a result of committing an aggravated felony or certain other specified offenses. *Id.* AEDPA simultaneously expanded the definition of "aggravated felony," making more aliens deportable for relatively minor crimes and thus increasing the importance of the Section 212(c) discretionary waiver of removal. *See St. Cyr*, 533 U.S. at 296 n.6.

Shortly thereafter, Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548. In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's effective date) could still seek Section 212(c) relief. *St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice ("DOJ") promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. *See* 8 C.F.R. § 1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be

denied if . . . [t]he alien is deportable . . . on a ground which does not have a statutory counterpart in section 212 of the Act.").

Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. § 1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" that would render an LPR inadmissible under Section 212(a). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.' " *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of removal of aggravated felonies, including "crimes of violence" under 8 U.S.C. § 1101(a)(43)(F) and "sexual abuse of a minor" under § 1101(a)(43)(A). The courts of appeals likewise recognized the availability of Section 212(c) relief to persons convicted of such crimes. *See, e.g.*, *Hem v. Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo v. Gonzales*, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States v. Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004) (burglary). In fact, this Court specifically noted the

application of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.

B. The BIA Changes Course In 2005

On April 6, 2005 – just one month after the IJ informed Petitioner that his 1992 conviction could be waived under Section 212(c) – the BIA, purporting to interpret the 2004 DOJ regulation, abruptly changed the rules. In *Matter of Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a crime involving moral turpitude. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a subsection of INA § 237 that was phrased similarly to an inadmissibility subsection in INA § 212(a). *Id.* at 728. Purporting to rest its conclusion on decisions of the Second Circuit, the BIA barred the LPR in *Matter of Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would render him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and returned. Shortly thereafter, the BIA applied the same reasoning to "crime of

violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

C. The Circuit Split

The courts of appeals have divided in response to *Matter of Blake*. The Second Circuit reversed the BIA in *Matter of Blake* itself. *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). Nine other courts of appeals have affirmed the *Matter of Blake* rule. One of those, the Ninth Circuit *en banc* panel below, affirmed the BIA's decision in a slightly different manner, rejecting the original *Francis* finding grounded in equal protection, leaving the regulations and the BIA interpretation of § 212(c) eligibility based on those regulations undisturbed. App. 1.

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See St. Cyr,* 533 U.S. at 296 n.6. In the four and one-half years since *Matter of Blake*, the issue already has arisen in scores if not hundreds of cases around the country and produced published opinions in almost every circuit. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The judgment of the several circuits that have upheld the BIA's decision in *Matter of Blake* should be reversed. The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Matter of Blake* – ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr* –

was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what this Court held Congress had *not* done through legislation. The BIA's new approach, ratified by the court of appeals, rests on an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and resurrects the unconstitutional practice of discriminating between similarly-situated aliens on the basis of irrelevant facts. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation.

The Court should therefore grant certiorari in the pending petition in the companion case of *De La Rosa*, *see* Pet., *De La Rosa v. Holder* (U.S. Nov. 13, 2009) (No. 09-___), in order to review the fundamental issue presented by the BIA's *Matter of Blake* decision, and keep this instant case held in abeyance pending the decision on how to proceed in *De La Rosa* and then proceed consistently in this case as well.

II. The Circuit Split On The Application Of Section 212(c) To Deportable Legal Permanent Residents Is Deeply Entrenched

Since the BIA's 2005 decision in *Matter of Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split different ways.

First, the Second Circuit has reversed the basic holding of the BIA's *Matter of Blake* decision. The Second Circuit recognized that the BIA's decision in *Matter of Blake* revived the equal protection problem – first identified in *Francis* – of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake v. Carbone*, 489 F.3d at 102-103. To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103.[3]

Second, eight other courts of appeals affirmed the BIA's formulaic approach in *Matter of Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). On this basis, the essential reasoning employed by the BIA in *Matter of Blake* was affirmed, and the fundamental equal protection problem it creates remains.

Third, the Ninth Circuit below (in a 6-5 *en banc* decision) reached the same result but through a

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[3] Judges in other circuits have praised the Second Circuit's reasoning. *See, e.g.*, App. 23 (Thomas, J., joined by Pregerson, J., dissenting); *Vue v. Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (Bye, J. concurring); App. 67 (Berzon, J., concurring).

different path than that adopted by the BIA. The Ninth Circuit instead embarked on what is essentially an academic exercise that has little practical effect when it overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. App. 1. The Ninth Circuit's decision side-stepped the original issue that the other Circuits addressed in reviewing the BIA's reasoning in *Matter of Blake*, because under the Ninth Circuit's analysis, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions observed, the Ninth Circuit majority failed to observe *stare decisis*, ignored decades of consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of the previously settled construction of the statute. App. 11 (Clifton, J., concurring); App. 23 (Thomas, J., dissenting). Seven judges dissented from the Ninth Circuit's denial of Abebe's request for full court rehearing *en banc*. App. 93. However, in terms of eligibility for relief of an application subject to Ninth Circuit jurisdiction, there is no practical difference between the *en banc* Court's holding and the BIA's practice following *Matter of Blake* because both leave in place the implementing regulations and their interpretation by the BIA. *See* App. 10; *Matter of Morena-Escobosa*, 25 I. & N. Dec. 114 (BIA 2009).

Because the Ninth Circuit does not squarely address the underlying issue, but the Eleventh Circuit decision in *De La Rosa* does, Petitioner respectfully suggests that the Court grant the petition for writ of certiorari filed in *De La Rosa* and currently pending before this Court, and keep the instant petition in abeyance pending resolution of that one, and then resolve both cases consistently.

III. Most Circuit Courts And The BIA Incorrectly And Unconstitutionally Restricted The Scope Of Section 212(c) Relief

The BIA's *Matter of Blake* decision "proved to be a watershed moment in [Section] 212(c) jurisprudence." *De La Rosa v. U.S. Attorney General*, 579 F.3d 1327, 1332 (11th Cir. 2009). Before 2005, the BIA consistently held that an LPR deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief from removal if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i)).

In *Matter of Blake*, however, the BIA sought to change the law retroactively by foreclosing Section 212(c) relief to LPRs who were charged under a deportation provision that used language that was not similar to the language of an inadmissibility provision. By doing so, the BIA categorically foreclosed large categories of deportable individuals –

who had previously been eligible for a discretionary waiver of removal – from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to otherwise similarly-situated persons who have left the country and reentered before the removal proceeding commenced. That was error.

1. The BIA's *Matter of Blake* decision creates an irrational distinction between LPRs who have traveled abroad and LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection.

Congress has long accepted the BIA's application of Section 212(c) to deportable LPRs who traveled abroad after their convictions and before the initiation of proceedings. *Matter of L-*, 1 I. & N. Dec. at 2; *see also St. Cyr*, 533 U.S. at 294 (noting that the INS "relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for deportation arose" (emphasis added)).

Congress is presumed to have been aware of the BIA's interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *see also Boeing Co. v. United States*, 537 U.S. 437, 457 (2003) (Congress's failure to override a seven-year old regulation when amending relevant

statutory provisions "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent.").

Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* traveled abroad were constitutionally entitled to the same treatment under Section 212(c) as those who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors" and therefore should be "treated in a like manner"). The BIA implemented *Francis* using the "comparable ground" or "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a conviction that fell under a "comparable" or "counterpart" *exclusion* provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for crimes involving "sexual abuse of a minor," because most such convictions are also grounds of exclusion – "crimes involving moral turpitude" under INA § 212(a)(2)(A)(i). The BIA and numerous courts of appeals decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. Congress amended the INA many times after *Francis*, but it has not cast doubt on that consistent interpretation of Section 212(c).

After the 1996 repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *See Matter of Soriano*, 21 I. & N. Dec. 516, 518-521 (BIA 1996). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. at 728 (emphasis added). While acknowledging that "there may be considerable overlap" between grounds of deportation like "sexual abuse of a minor" offenses and grounds of inadmissibility like "crime involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), appeal docketed, No. 08-70736 (9th Cir.). It was also contrary to the settled interpretation of Section 212(c) acknowledged in *St. Cyr* and in the BIA's own decisions. The BIA's new approach draws an arbitrary and irrational line based on recent travel abroad. LPRs who pled guilty to a pre-1997 offense that qualifies as both a "sexual abuse of a minor" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief if they depart the country and return, by invoking the *nunc pro tunc* procedure. But under *Matter of Blake*, identically-situated LPRs who did *not* depart the country are categorically ineligible for relief. Making

Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(a).

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly-situated deportable LPRs on the basis of an irrational classification, such as whether one group of LPRs recently traveled abroad. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face . . . if it is applied and administered by public authority . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

Accordingly, the correct legal analysis for § 212(c) eligibility should be to determine whether the applicant's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and returned – as the Second Circuit directed in *Blake*. 489 F.3d at 105. The BIA's *Matter of Blake* decision instead was arbitrary and capricious, inconsistent with the settled

interpretation of Section 212(c), and unconstitutional.[4]

2. The BIA's *Matter of Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. *See* 8 C.F.R. § 1212.3(f)(5). The regulation provides that Section 212(c) relief "shall be denied if . . . [t]he alien is deportable under former section 241 of the Act or removable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." *Id.* On its face, this regulation is consistent with the BIA's prior practice of holding that an LPR deportable for having committed an aggravated felony was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

But even if the BIA's interpretation that the aggravated felony subsections at issue ("sexual abuse of a minor" and "crime of violence") were not sufficiently similar to any ground of inadmissibility (including crime involving moral turpitude) was correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions a retroactive application.

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[4] On remand from the Second Circuit, an IJ found that the Petitioner in *Blake* was eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

IV. This Case Presents An Issue Of Exceptional And Continuing Importance To Numerous Legal Permanent Residents

The LPRs most affected by the BIA's decision in *Matter of Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). By definition, those applicants who would still be eligible for relief were convicted at least 13 years ago and have remained free of any new convictions that render them deportable or inadmissible. They likely have had 20 years or more of residency. Petitioner, for example, came to the United States as a refugee over 25 years ago from a war-torn homeland. Mr. De La Rosa's offense, which took place when he was 20, did

not involve coercion or violence. *See* Pet., *De La Rosa v. Holder* (U.S. Nov. 13, 2009) (No. 09-____).

Petitioner and De La Rosa are not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] . . . the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§ 212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous aliens who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago").

The BIA's *Matter of Blake* decision forecloses many deserving LPRs from pursuing this critical source of relief from removal, the availability of which this Court reaffirmed in *St. Cyr*. Petitioner does not contend that he has a legal *right* to ultimate relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to have the agency exercise that discretion following an evidentiary hearing on the merits – a hearing that he was entitled to as of March 25, 2005 and was only

denied because of the BIA's retroactive "change in law." *Matter of Cardona*, 2005 WL 3709244.

Absent this Court's intervention, numerous deserving legal immigrants will be unlawfully denied relief from removal based only on an fortuitous happenstance – either an accident of geography – the jurisdiction in which their immigration proceedings happened to be held, an accident of timing – whether or not their case happened to come to the attention of authorities and be completed before *Matter of Blake* was issued, or an accident of procedure – whether their removal proceedings were initiated with a charge of inadmissibility, a charge of deportability after returning from travel abroad, or a charge of deportability without having left the country first, none of which has any relevance to the appropriateness of relief but which could entirely preclude the agency charged with administering the statute from being able to exercise its discretion in even the most worthy case.[5]

In a pending petition for certiorari, Jose Erasmo De La Rosa has asked this Court to resolve this conflict among the circuits. *See* Pet., *De La Rosa v.*

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[5] This Court denied certiorari in *Gonzalez-Mesias v. Holder*, No. 08-605 (April 20, 2009), but at that time the Eleventh Circuit had not spoken to the issue in a published opinion, and the Ninth Circuit was still considering the petition for full court review in *Abebe*. The views of those Circuits are now known and have only deepened the circuit split – no further percolation among the Circuits should be expected.

Holder (U.S. Nov. 13, 2009) (No. 09-____). For the reasons discussed here, and because the issues are more fully developed in De La Rosa's petition, and the Court's disposition of De La Rosa's petition would affect the outcome of this matter, the Court should at a minimum hold this case until it has decided whether to grant review in *De La Rosa* and then dispose of this case consistent with its disposition of *De La Rosa*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 16, 2009

554 F.3d 1203

United States Court of Appeals,
Ninth Circuit.
Yewhalashet ABEBE,
Petitioner,
v.
Michael B. MUKASEY, Attorney General,
Respondent.

No. 05-76201.

Argued and Submitted March 25, 2008.
Filed Jan. 5, 2009.

Robert B. Jobe (argued) and Fatma Marouf, Law Office of Robert B. Jobe, San Francisco, CA, for the petitioner.

Zachary Miller Nightingale, Avantika Shastri, and Marc Van Der Hout, Van Der Hout, Brigagliano and Nightingale, LLP, San Francisco, CA, for amicus curiae, the National Immigration Project of the National Lawyers Guild.

Marc Christopher Fleming and James Quarles, Wilmer Cutler Pickering Hale & Dorr, LLP, Boston, MA, for amicus curia, Joel Judulang.

Thomas H. Dupree, Jr., Deputy Assistant Attorney General; Peter D. Keisler, Assistant Attorney General; M. JocelynLopez Wright, Assistant Director, Office of Immigration Litigation; Song E. Park, Office of Immigration Litigation, Washington, DC, for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A26-810-941.

Before ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, ANDREW J. KLEINFELD, SIDNEY R. THOMAS, BARRY G. SILVERMAN, RONALD M. GOULD, RICHARD C. TALLMAN, RICHARD R. CLIFTON, CONSUELO M. CALLAHAN, CARLOS T. BEA and N. RANDY SMITH, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge CLIFTON; Dissent by Judge THOMAS.

ORDER

The per curiam opinion that was filed November 20, 2008, was filed in error. The opinion accompanying this order is substituted as the opinion of the court. The previously filed concurrence and dissent are unaffected by this order.

The petition for rehearing remains pending. Within 14 days, respondent shall file a response to the petition. Petitioner may reply within 14 days of the response; the reply shall not exceed the length permitted for the response. *See* 9th Cir. R. 40-1.

OPINION

PER CURIAM:

1. Petitioner became a lawful permanent resident in 1984 and, in 1992, pled guilty to lewd and lascivious conduct upon a child. Cal.Penal Code § 288(a). INS commenced removal proceedings on the ground that he was deportable as having committed an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii) –

"sexual abuse of a minor," *id.* § 1101(a)(43)(A). The Immigration Judge (IJ) denied petitioner's asylum, withholding of removal and Convention Against Torture claims, and found petitioner ineligible for a discretionary waiver of deportation under former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).[1] On appeal to the Board of Immigration Appeals (BIA), petitioner argued that he's eligible for section 212(c) relief. The BIA affirmed, and Abebe petitions for review.

2. Petitioner argues that, by finding him ineligible for section 212(c) relief, the BIA denied him equal protection. Relying on *Komarenko v. INS,* 35 F.3d 432, 434-35 (9th Cir.1994), the three-judge panel held that petitioner isn't eligible for section 212(c) relief. *Abebe v. Gonzales,* 493 F.3d 1092, 1104-05 (9th Cir.2007), *vacated,* 514 F.3d 909 (9th Cir.2008). Under *Komarenko,* 35 F.3d at 434-35, a deportable alien can be eligible for section 212(c) relief only if his grounds for deportation are substantially identical to a ground for inadmissibility.[2] Here, petitioner is deportable

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[1] Even though section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, the Supreme Court held that this repeal can't be applied retroactively to aliens, such as petitioner, who pled guilty to deportable crimes before IIRIRA took effect. *INS v. St. Cyr,* 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

[2] Inadmissibility (or "exclusion" under pre-IIRIRA law) applies to an alien outside the United States who is not allowed to enter, 8 U.S.C. § 1182(a), whereas deportation applies to an alien who is already in the United States and is ejected, *id.*

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for committing an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii), which the panel held isn't substantially identical to the most analogous ground for inadmissibility – committing a "crime involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). *Abebe,* 493 F.3d at 1104-05. Petitioner claims that the rationale of *Komarenko* can't be squared with that of *Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir.1981). He therefore asks us to overrule *Komarenko,* and hold that a deportable alien can only be eligible for section 212(c) relief if his *conviction* is substantially identical to a ground for inadmissibility. *See Abebe,* 493 F.3d at 1106 (Berzon, J., concurring).

Under its plain language, section 212(c) gives the Attorney General discretion to grant lawful permanent residents relief only from *inadmissibility*[3] – not deportation. *See* 8 U.S.C. § 1182(c) (repealed 1996). *Tapia-Acuna,* though, followed *Francis v. INS,* 532 F.2d 268, 273 (2d Cir.1976), and held that equal protection required us to extend section 212(c) relief to aliens facing deportation – if such aliens would have been eligible for section 212(c) relief from inadmissibility, had they left the United States and

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§ 1227. *See Guzman-Andrade v. Gonzales,* 407 F.3d 1073, 1076 (9th Cir.2005). Under IIRIRA, both inadmissible and deportable aliens go through the same process, called "removal proceedings." *Id.* (citing *Romero-Torres v. Ashcroft,* 327 F.3d 887, 889 (9th Cir.2003)).

[3] IIRIRA changes somewhat the nomenclature applicable to immigration cases. What used to be "excludability" is now "inadmissibility"; what used to be "deportation" is now "removal." We use these terms interchangeably.

attempted to reenter. *Tapia-Acuna,* 640 F.2d at 225. In following *Francis, Tapia-Acuna* reasoned that there is no rational basis for granting additional immigration relief to aliens who temporarily leave the United States and try to reenter (i.e., aliens facing inadmissibility), and not to aliens who remain in the United States (i.e., aliens facing deportation). *Tapia-Acuna,* 640 F.2d at 225. According to *Francis* and *Tapia-Acuna,* it is wholly irrational for Congress to give *any* advantage to aliens outside the United States that it denies to similarly situated aliens within the United States.

We are not convinced that *Francis* and *Tapia-Acuna* accorded sufficient deference to this complex legislative scheme, and therefore reconsider this question, as we are authorized to do en banc. We note at the outset that the statute doesn't discriminate against a discrete and insular minority or trench on any fundamental rights, and therefore we apply a standard of bare rationality. *United States v. Barajas-Guillen,* 632 F.2d 749, 752 (9th Cir.1980) (quoting *Alvarez v. Dist. Dir. of the U.S. INS,* 539 F.2d 1220, 1224 (9th Cir.1976)). Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens. *See Kleindienst v. Mandel,* 408 U.S. 753, 769-70, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Boutilier v. INS,* 387 U.S. 118, 123-24, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967); *Flemming v. Nestor,* 363 U.S. 603, 616, 80 S.Ct. 1367, 4 L.Ed.2d

1435 (1960). Our task, therefore, is to determine, not whether the statutory scheme makes sense to us, but whether we can conceive of a rational reason Congress may have had in adopting it.[4]

We can: Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to "create[ ] an incentive for deportable aliens to leave the country." *Requena-Rodriguez v. Pasquarell,* 190 F.3d 299, 309 (5th Cir.1999) (quoting *LaGuerre v. Reno,* 164 F.3d 1035, 1041 (7th Cir.1998)); *see De-Sousa v. Reno,* 190 F.3d 175, 185 (3d Cir.1999). A deportable alien who wishes to obtain section 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens. *See Jurado-Gutierrez v. Greene,* 190 F.3d 1135, 1153 (10th Cir.1999), *abrogated in part by INS v. St. Cyr,* 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347

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[4] In making this determination, we do not look to the actual rationale for the legislation, as it is often very difficult or impossible to determine what a collective body, such as Congress, has in mind. The task would be particularly difficult in a case like ours where the statutory scheme now in force is the product of repeated layers of congressional enactments and judicial interpretations, so it is quite likely that no one anticipated the existing Byzantine structure. Our inquiry therefore focuses on whether a hypothetically rational Congress could have adopted the statutory scheme, not on whether Congress actually adopted the statute with that particular reason in mind.

(2001). Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.

Our dissenting colleagues argue that the reason we attribute to Congress is not so rational after all because aliens who are "excludable yet potentially eligible for a section 212(c) waiver . . . [are] generally allowed to enter and to apply for waiver from within the country," and so the government will wind up having to deport those aliens anyway, if they are denied 212(c) relief. Dissent at 1215. But the fact that the government may choose, as a matter of grace, to admit aliens who seem very likely to be granted 212(c) relief does not mean that it won't exclude those it believes are less likely to obtain such relief. The rationality of the statute lies in giving that discretion, on a case by case basis, to an agency that can assess the likelihood of the alien's success and the cost of his removal.[5]

The dissent makes a similar error when it argues that it is inconsistent with the statutory scheme to assume "that a rational Congress would want these persons to leave the country." Dissent at 1216. The supposed irrationality here, as we understand it, would be in having people leave the country only to be re-admitted after they are granted relief.

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[5] The dissent also claims that this will somehow "increase the number of removal proceedings, which would, in turn, spend *more* government resources," dissent at 1216, but it doesn't explain how or why this would be the case.

The dissent overlooks the fact that not all those who apply for relief ultimately receive it; many, perhaps most, will not. And as to those, it makes perfect sense to want them to be outside our borders when they get the bad news. At that point, they cannot rely on inertia to remain in the country despite the adverse decision, and force the government to chase them down and pay for their deportation. As Judge Posner noted in *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir.1998), "[t]o induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings." To what extent this will actually save the government resources is something we won't know until we try it, but it is hardly irrational to presume that a significant number of aliens may decide to depart in order to get a shot at 212(c) relief. Congress certainly is entitled to experiment, without interference from the judiciary.[6] For much the same reason, the dissent is

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[6] The dissent's citation to *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), dissent at 1215 is misplaced. This case involved sex discrimination, and distinctions based on sex have been subjected to far more searching scrutiny for the last 4 decades or so. *See also Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Here we are not dealing with sex discrimination, or discrimination based on any other suspect category. And we're dealing with an area where federal power is at its zenith; indeed, the Supreme Court has instructed us that we must exercise "special judicial deference to congressional policy choices in the immigration context." *Fiallo v. Bell*, 430 U.S. 787, 793, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977)

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mistaken in arguing that we've undermined the validity of 8 C.F.R. § 1212.3(f)(5) under the rationale of *INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Dissent at 1216. The INS may certainly choose to treat different classes of aliens the same, even though the statute does not, and nothing in *St. Cyr* prevents it from doing so. Of course, our ruling might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary. But that's up to the government; nothing we say today casts any doubt on the regulation.

We thus overrule *Tapia-Acuna*'s holding that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation. The BIA therefore didn't violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation. Since petitioner was not eligible for section 212(c) relief in the first place, the BIA could not have committed an equal protection violation by denying him such relief. We affirm the BIA's section 212(c) ruling, and have no reason to reconsider *Komarenko.* Indeed, under our ruling today, *Komarenko* becomes a dead letter, as its only purpose was to fill a gap created by *Tapia-Acuna.*

3. Petitioner also argues that the IJ erred by denying his claim for withholding of removal. But petitioner didn't raise a withholding of removal claim

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(footnote omitted). It would thus be a rare case, indeed, where we could find irrationality in a congressional decision to distinguish among classes of aliens (other than along suspect lines).

in his brief before the BIA, and the BIA was therefore not required to consider it. *See, e.g., Bowers v. Nat'l Collegiate Athletic Ass'n,* 475 F.3d 524, 535 n. 11 (3d Cir.2007) (issues raised in the notice of appeal but not argued in appellant's principal brief are deemed abandoned). When a petitioner files no brief and relies entirely on the notice of appeal to make an immigration argument, as he may do before the BIA, *see* 8 C.F.R. § 1003.38(f), then the notice of appeal serves in lieu of a brief, and he will be deemed to have exhausted all issues raised therein. But when a petitioner does file a brief, the BIA is entitled to look to the brief for an explication of the issues that petitioner is presenting to have reviewed. Petitioner will therefore be deemed to have exhausted only those issues he raised and argued in his brief before the BIA. Here, petitioner did file a brief, which did not raise the withholding of removal issue. He therefore didn't exhaust that claim, and we lack jurisdiction to review it. *Barron v. Ashcroft,* 358 F.3d 674, 677 (9th Cir.2004) (citing 8 U.S.C. § 1252(d)(1)). To the extent *Ladha v. INS,* 215 F.3d 889, 903 (9th Cir.2000), is to the contrary, it is overruled.

PETITION DENIED IN PART and DISMISSED IN PART.[7]

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[7] For the reasons given in the three-judge panel opinion, the BIA didn't erroneously or inconsistently apply 8 U.S.C. § 1182(c) (repealed 1996), or 8 C.F.R. § 1213(f). *Abebe,* 493 F.3d at 1101-04. Likewise, we reject petitioner's due process retroactivity argument. *Id.* at 1105.

CLIFTON, Circuit Judge, with whom Circuit Judges SILVERMAN and GOULD join, concurring in the judgment:

I concur in the judgment, denying in part and dismissing in part Yewhalashet Abebe's petition for review. I do not join most of the majority opinion,[1] however, because I believe it is both unnecessary and unwise to overrule our prior decision in *Tapia-Acuna v. INS,* 640 F.2d 223 (9th Cir.1981), to reach that result. The government has not advocated such a drastic step. The original decision by a three-judge panel of our court, *Abebe v. Gonzales,* 493 F.3d 1092 (9th Cir.2007), reached the same result in this case as the majority reaches today, simply by applying our existing precedent, *Komarenko v. INS,* 35 F.3d 432 (9th Cir.1994). The en banc panel should do the same.

I share the concern expressed in the dissent with overruling more than sixty years of agency precedent and more than twenty-seven years of our own precedent. I also share the fear that the path taken by the majority puts into jeopardy the agency's ability to continue to grant discretionary relief in removal proceedings pursuant to 8 C.F.R. § 1212.3. Although the majority says otherwise, its interpretation of the statute appears to leave no room for that practice to continue. In addition, I would prefer to avoid

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[1] I do join in Part 3 of the majority opinion, because I agree that petitioner did not exhaust his withholding of removal claim before the agency.

aggravating a circuit split with the numerous other courts that have adopted the same balance we struck in *Komarenko*.

I nevertheless concur in the judgment because I conclude that aliens who could have been, but were not, charged with removal on grounds equivalent to a ground for inadmissibility are not similarly situated to aliens who were actually so charged. Abebe's equal protection challenge therefore fails. Put another way, although I agree with most of Part I of the dissent, I disagree with Part II and do not believe we should overturn our decision in *Komarenko* and follow the Second Circuit's recent decision in *Blake v. Carbone,* 489 F.3d 88 (2d Cir.2007). I would adhere to *Komarenko* and deny Abebe's petition accordingly.

II.

As the dissent points out, since at least 1940 the Executive Branch (now in the form of the Department of Homeland Security, or DHS, and formerly through the Immigration and Naturalization Service, or INS) has interpreted the Immigration and Nationality Act (INA) as granting it the discretion to afford relief from both deportation (of an alien inside the United States, a process now called removal) and exclusion (of an alien seeking admission to this country at the border, now described as inadmissibility). *See Matter of L.,* 1 I. & N. Dec. 1 (BIA 1940). Congress was aware of this practice when it drafted the 1952 amendments to the INA, including section 212(c). *See In the Matter*

of S., 6 I. & N. Dec. 392, 394-96 (BIA 1955) (examining the legislative history). Although the amendments made it harder for aliens to qualify for such discretionary relief, there is nothing in the legislative history, which catalogued other perceived abuses, to suggest that Congress disapproved of the government's use of the predecessor to section 212(c) to grant waivers in deportation proceedings. This is among the reasons that the Board of Immigration Appeals held, shortly after the amendments' passage, that the Attorney General retained the discretion under section 212(c) to grant relief in both deportation and exclusion proceedings. *Id.*

Initially, the government permitted aliens to apply for relief from deportation only if they had temporarily left the country such that they might have been subject to exclusion. In 1981, we held in *Tapia-Acuna* that there was no rational basis in the context of section 212(c) for discriminating against aliens who had remained in the United States. *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir.1981).

Today, the majority holds that we were mistaken in *Tapia-Acuna* and that there is a legitimate basis for so limiting the availability of section 212(c) relief. Even assuming there are arguments in favor of that position, we rejected it twenty-seven years ago. There is no compelling reason to overturn that judgment now. No relevant circumstances have changed, and our decision has been on the books for nearly three decades without causing any mischief in the law. The majority may be animated by a desire to avoid future

problems or more expansive conceptions of equal protection, such as that expressed by the Second Circuit in *Blake,* but that appears to me to be an empty fear. We haven't extended *Tapia-Acuna*'s rationale to other situations, and any putative harm in the future could more easily be avoided by continuing to limit that precedent to its context.

The majority doesn't quarrel with the legal rule of *Tapia-Acuna,* that the Equal Protection Clause prohibits irrational disparities in treatment. It simply disagrees with the application of that long-settled rule to a statutory provision that was repealed a dozen years ago. It disagrees that the disparate treatment our court previously concluded was irrational is, in fact, irrational. Reasonable minds may always disagree over the outcome of a close case, however, and our prior conclusion is consistent with the conclusions of every other circuit. I see no justification for saying now that all of those decisions were incorrect, especially when the vitality of section 212(c), a statute long since repealed, has already diminished to near insignificance. There is no pressing need to pay so little heed to the weight of precedent and correct what, at most, is simply a misapplication of an agreed upon rule.

The "rational basis" the majority identifies in support of discriminating against aliens who failed to temporarily leave the United States after committing an offense that might qualify them for removal or inadmissibility relies on a tenuous chain of inferences. The majority hypothesizes that Congress

anticipated that some aliens might decide to travel across the border based on knowledge that, under the immigration statute, they could be eligible for discretionary relief if they left the country and returned, but would not be so eligible if they did not leave the country. The majority further speculates that, from the group of aliens who left the country for this reason, some might be successfully stopped at the border upon their return and denied reentry, thereby saving the government the expense of having to later remove them. Perhaps. But it is not an accident that the majority opinion finds it necessary to acknowledge, at 217, n. 4, that it is not seeking to identify the actual rationale for the legislation. I doubt that anyone believes that the majority's tortured construct was in the mind of anybody on Capitol Hill. Justifications for overruling one of our court's longstanding precedents should be made of sterner stuff. We might just as well say that Congress simply preferred to let the agency grant discretionary relief only to those aliens who love international travel. We must place some rational bounds on what survives rational basis review if the constitutional right of equal protection is to have any meaning whatsoever outside the context of suspect classifications.[2]

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[2] Perhaps the majority believes that equal protection should have force only in cases involving some form of invidious discrimination, and that all laws should survive rational basis review, but this case is a particularly poor vehicle to stake out that position given the growing irrelevance of section 212(c) and

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Not only does the majority overrule our precedent, it casts doubt on DHS's power to grant section 212(c) relief in deportation or removal proceedings. It concludes that "[u]nder its plain language, section 212(c) only gives the Attorney General discretion to grant lawful permanent residents relief from *inadmissibility* – not deportation." Majority Op. at 1205 (emphasis in original). In doing so, the majority holds that sixty-eight years of agency practice was contrary to the will of Congress and in violation of the plain language of the statute the agency is charged with interpreting, and that countless otherwise deportable or removable aliens have remained in this country due to the agency's error.

Later, when addressing the dissent, the majority says otherwise and contends that nothing in the opinion undermines the validity of 8 C.F.R. § 1212.3(f)(5). That regulation codifies DHS's approach, which we approved of in *Komarenko,* of limiting the availability of section 212(c) relief in removal proceedings to aliens charged with removal on a ground that has a substantially identical statutory counterpart in the INA's inadmissibility provisions (the "statutory counterpart rule"). 8 C.F.R. § 1212.3(f)(5); *Komarenko v. INS,* 35 F.3d 432, 434 (9th Cir.1994). But if the statute itself does not authorize DHS to grant section 212(c) relief in any removal proceedings whatsoever,

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the need to break away from all of our sister circuits and reverse our own precedent to do so.

as the majority holds, where does authority to grant similar relief from inadmissibility come from?

It is not an answer to say that the government may choose to treat different classes or aliens the same. The statute in question is one that authorizes INS (now DHS) to grant *discretionary* waivers to persons in exclusion proceedings. If the agency had the authority to grant discretionary waivers to everyone, including persons in deportation proceedings, whether or not the statute provides such authority, then there would be no reason for the statute in the first place. The whole thrust of the majority's reasoning is that Congress, in adopting the relevant statute, could rationally distinguish between deportation and exclusion proceedings and could limit the ability of INS to grant discretionary waivers only to those in exclusion proceedings. Under the reasoning of the majority, the agency does not have the authority to grant such waivers to aliens in deportation proceedings, and if that's the case, 8 C.F.R. § 1212.3(f)(5) serves no purpose.

Finally, not only has every circuit to consider the question accepted *Tapia-Acuna*'s conclusion that section 212(c) relief is available in deportation and removal proceedings regardless of whether an alien has left the country, but every circuit to consider the question except the Second Circuit, *see Blake,* 489 F.3d at 104, has also followed *Komarenko* and upheld the constitutionality of DHS's statutory counterpart rule. *See Kim v. Gonzales,* 468 F.3d 58, 62-63 (1st Cir.2006); *Caroleo v. Gonzales,* 476 F.3d 158, 162-63

(3rd Cir.2007); *Brieva-Perez v. Gonzales,* 482 F.3d 356, 362 (5th Cir.2007); *Gjonaj v. INS,* 47 F.3d 824, 827 (6th Cir.1995) ("Numerous courts have held there must be a comparable ground of exclusion for an alien in deportation proceedings to be eligible for [section] 212(c) relief. We decline to change this well-established rule."); *Valere v. Gonzales,* 473 F.3d 757, 762 (7th Cir.2007) (holding that if "the removable alien's crime of conviction is not substantially equivalent to a ground of inadmissibility . . . then the removable alien is not similarly situated for purposes of claiming an equal protection right to apply for § 212(c) relief"); *Soriano v. Gonzales,* 489 F.3d 909 (8th Cir.2006); *Rodriguez-Padron v. INS,* 13 F.3d 1455, 1459 (11th Cir.1994); *see also Zamora-Mallari v. Mukasey,* 514 F.3d 679, 691-92 (7th Cir.2008) (rejecting the reasoning of the Second Circuit's decision in *Blake*); *Vue v. Gonzales,* 496 F.3d 858, 860-62 (8th Cir.2007) (same). In overruling *Tapia-Acuna* and discarding *Komarenko* as a dead letter, the majority creates a three-way circuit split between those circuits that follow *Komarenko,* those that follow *Tapia-Acuna* but not *Komarenko,* and our court. Because I can discern no good reason to abandon our sister circuits after they have faithfully accompanied us down this now well-worn path, I cannot join the majority opinion.

II.

Turning to the merits of Abebe's equal protection challenge, the dissent states that "[i]n cases such as

this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the government chooses to use to deport the aliens." Dissent at 1217. I disagree.

The government sought to remove Abebe on two independent grounds: (1) his two convictions for committing crimes involving moral turpitude (CIMTs) and (2) his conviction for committing an aggravated felony. Abebe argues that his aggravated felony conviction could also qualify as a CIMT and that, if the government had sought to remove him solely for CIMTs, which can also render an alien eligible for exclusion, then he would have been eligible for discretionary relief under section 212(c). He contends that DHS's statutory counterpart rule violates his right to equal protection under the Due Process Clause because it denies him the benefit of section 212(c) relief simply because the government chose to remove him as an aggravated felon instead of an alien who had committed CIMTs. Abebe asks that the court impose a rule under which an immigration judge would be forced to determine whether, given a particular conviction, the government *could* have sought to remove an alien on a ground equivalent to a ground for inadmissibility.

Abebe cannot demonstrate that he has been irrationally subjected to discriminatory treatment, however, because he cannot show that he was in the same position as an alien who was charged with removal on a substantially similar ground to a ground for inadmissibility. Put simply, two aliens who

have been charged with removal on different statutory grounds are not similarly situated. That the underlying facts are such that the government could have charged them with removal under similar statutory grounds is not enough. If that rule were adopted, it would create a host of problems in countless situations, predictable and unpredictable, where the government is vested with, and exercises, discretion. To take the most obvious example, imagine the quotidian circumstance of a prosecutor faced with the decision of what charges to bring against an individual based on a given set of facts. Each charge will carry different consequences, but a defendant cannot contest the charges actually brought against him by arguing that the government could have charged him with a different offense under a different statutory provision.

Congress has vested the executive branch with discretion in whether, when, and how to charge an alien with removal. How it exercises that discretion will have a serious impact on the life of a removable alien, whether it means forcible removal from the country or the availability of section 212(c) relief. To hold that the exercise of that discretion is unconstitutional where it is not exercised in the most advantageous way possible for a given alien under the circumstances would open the door to a torrent of claims. An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to

a sentencing range consistent with the least serious crime with which he could have been charged.

This is not to say that the executive branch's exercise of discretion is without constitutional limits. We have permitted claims to proceed against prosecutors whose decisions were allegedly made on the basis of sex, race, or religion. *United States v. Redondo-Lemos,* 955 F.2d 1296, 1300 (9th Cir.1992), *overruled on other grounds by United States v. Armstrong,* 48 F.3d 1508 (9th Cir.1995) (en banc), *rev'd,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Absent evidence of discrimination against a suspect class, however, there is no judicial remedy for even arbitrary charging or plea bargaining decisions, even though "such an arbitrary exercise of power would be a Due Process violation." *Morris v. U.S. Dist. Court,* 363 F.3d 891, 896 (9th Cir.2004) (citing *Redondo-Lemos,* 955 F.2d at 1300). This is because judicial inquiry "into prosecutors' decision-making processes would entangle [courts] 'in the core decisions of another branch of government,'" raising separation-of-powers concerns. *Id.*

In *Komarenko,* this court provided additional, pragmatic reasons for denying section 212(c) relief to an alien charged with deportation under a subsection of the former deportation statute that was not "substantially identical" to a subsection of the former exclusion statute. Like Abebe, the petitioner in *Komarenko* argued that his underlying conviction could have qualified as a CIMT, a statutory ground for exclusion, which would have made him eligible for

section 212(c) relief. The court held that the two grounds were "entirely dissimilar" and that "the distinction between the two classes is not arbitrary or unreasonable." 35 F.3d at 435 (citing *Campos v. INS*, 961 F.2d 309, 316 (1st Cir.1992) ("We cannot say that it is absurd that for purposes of discretionary deportation review Congress chooses to treat different crimes differently."). We declined to engage in speculation over whether a particular alien "*could have been* excluded under the moral turpitude provision," and noted that adopting the petitioner's proposed approach "would extend discretionary review to every ground for deportation that could constitute the essential elements of a crime involving moral turpitude." *Id.* (emphasis in original) (internal quotation marks omitted). The court concluded that "[s]uch judicial legislating would vastly overstep our limited scope of judicial inquiry into immigration legislation, and would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Id.* (internal citations and quotation marks omitted). This reasoning applies with equal force today and, as discussed above, six of the seven other circuits to face the question have reached the same result.

This is not a situation, as the dissent contends, where two lawful permanent residents are being treated differently because one chose to "step across the border for a day." Dissent at 1213. It is a situation where two individuals are being treated differently because the charges against them are materially

different, and different charges bring different consequences. This simple fact is as true in immigration proceedings as it is in criminal law. We cannot look only to the underlying conduct; rather, the consequences that ultimately flow from an individual's actions depend heavily on the government's exercise of its charging discretion.

Here, *Abebe* had a number of prior convictions. The government could have chosen to seek removal based on (1) his convictions for CIMTs, (2) his aggravated felony conviction, or (3) both. It chose option three, aggressively seeking removal on every available ground. The court should not put immigration judges in the business of second-guessing such charging decisions. In light of how the government chose to charge Abebe with removal, he was not similarly situated to an alien charged with being inadmissible, or an alien charged with removal on a ground with a statutory counterpart in the INA's inadmissibility provisions, and his equal protection challenge fails.

I therefore concur in the judgment of the court.

THOMAS, Circuit Judge, with whom PREGERSON, Circuit Judge, joins, dissenting:

Distilled to its essence, this case involves the irrationality of affording privileges to lawful permanent residents who step across the border for a day, but denying the same privileges to those who do not. The majority not only blesses this unequal treatment,

but goes much further, overruling more than 60 years of precedent, approving an unconstitutional statutory scheme not even the Board of Immigration Appeals endorses, and implicitly declaring unconstitutional a federal regulation.

I respectfully dissent.

I

First, some background. Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 ("IIRIRA"), there were separate procedures and substantive rules relating to (1) the deportation of persons already present in the United States, and (2) the exclusion of persons seeking entry. *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116, 1122 (9th Cir.2002). The INA defined deportable aliens in § 241, 8 U.S.C. § 1251 (transferred to § 237, 8 U.S.C. § 1227), and excludable aliens in § 212(a), 8 U.S.C. § 1182. The exclusion procedures did not only apply to those seeking entry into the United States in the first instance. If a non-citizen residing in the United States temporarily left the country, he could be excluded from re-entry. Lawful permanent residents ("LPRs") are, of course, non-citizens who have successfully satisfied statutory requirements and earned the favorable exercise of discretion by the government to be allowed to reside in the United States permanently. Although a permanent resident, an LPR still could be deported if he committed a qualifying crime. If he left the country

temporarily, he could also be excluded upon return if he had committed a qualifying offense. An LPR, as a non-citizen seeking entry, would generally be subject to the same proceedings and grounds of exclusion if he traveled abroad and returned to the United States. *See* INA §§ 101(a)(3) & (13), 66 Stat. 166, 167 (1952). Facing a large volume of cases in which a waiver of exclusion was sought in compassionate cases involving LPRs, Congress afforded certain qualifying LPRs the protection of subsection (c):

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).

INA § 212(c), 66 Stat. 187.

By its terms, former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), applies only to persons in exclusion proceedings. The Board of Immigration Appeals ("BIA") first recognized a problem with making section 212(c) relief available to excludables but not deportables in 1940, in the context of section 212(c)'s precursor statute.[1] *See Matter of L,* 1 I. & N.

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[1] Section 212(c) grew out of the Seventh Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874. *See Francis v. INS,* 532 F.2d 268 (2d Cir.1976).

Dec. 1 (1940). In *Matter of L*, the BIA held that relief under section 212(c)'s precursor was available in a deportation proceeding where the alien had departed and returned to the United States after the ground for exclusion/deportation arose. To hold otherwise, the BIA noted, would render the statute "capricious and whimsical." *Id.* at 5. The Second Circuit took this interpretation to its logical extension in *Francis,* 532 F.2d 268, holding that section 212(c) relief must be available to all persons in deportation proceedings who would be excludable on the same grounds, not just those who had actually left the country and reentered. Immediately following *Francis,* the BIA embraced the *Francis* analysis. *Matter of Silva,* 16 I. & N. Dec. 26, 30 (BIA 1976).

When the question then reached our Court, the matter had been so clearly determined that when we initially affirmed, in an unpublished disposition, a denial of section 212(c) relief to an alien in a deportation proceeding, the Supreme Court granted certiorari and remanded the case to us for reconsideration in light of the Solicitor General's position in its brief before the Supreme Court. The Solicitor General's Brief on Petition for a Writ of Certiorari asserted "the government's current position that those precedents [which limit section 212(c) to exclusion proceedings] are erroneous and should be overruled." Brief for the Respondent at 6, *Tapia-Acuna v. INS,* 449 U.S. 945, 101 S.Ct. 344, 66 L.Ed.2d 209 (1980). The Solicitor General further stated that "[i]n the government's view, the Ninth Circuit's

position is without support in either the statutory language of [section 212(c)] or the case law on which the court of appeals has relied." *Id.* at 6. On remand, we followed *Francis* and held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under [§ 241(a)(11) (narcotics conviction)], whether or not the alien has departed from and returned to the United States after the conviction." *Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir.1981).

To this date, every court to consider the issue has determined that due process requires that section 212(c) must be applied to deportation proceedings as well as exclusion proceedings. *See Blake v. Carbone,* 489 F.3d 88, 103-04 (2d Cir.2007) (discussing cases).

A

Our sister circuits are right. The Supreme Court has long held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Under the minimal scrutiny test, which is applicable in this case, distinctions between different classes of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Stanton v. Stanton,* 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). As the Second Circuit

recognized in *Francis,* "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." 532 F.2d at 273.

Throughout this litigation, the government has been unable to provide a rational basis for this unequal treatment. The majority attempts to conjure one, urging that the rational basis for making section 212(c) relief available only to aliens in exclusion proceedings is to encourage "self-deportation" and thus save government resources. There is no record support for this rationale, and the majority's reasoning contains two fundamental flaws. First, there is no support for the contention that encouraging "self-deportation," as described by the majority, would actually further the interest of saving government resources. Second, the rational reason the majority prescribes to Congress presumes an interest which is actually in conflict with the statute itself. While the majority correctly notes that we do not have to look to the actual rationale for the legislation, in order to be rational, the reason must be consistent.

When an LPR leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a section 212(c) waiver, the LPR is generally allowed to enter and to apply for the waiver from within the country. If the alien is ultimately denied the waiver, the government must remove him. No fewer government resources are exerted than if

the alien applied for a § 212(c) waiver during a deportation proceeding. Moreover, if the statute were to actually function as the majority presumes and encourage aliens to voluntarily place themselves in this position – a contention which I find dubious – this would increase the number of removal proceedings, which would, in turn, spend *more* government resources.[2] There is no support in the record for the assertion that treating returning LPRs differently from those who remain would save government resources.

Second, implicit in the majority's argument that a rational Congress would want to encourage aliens who are excludable but eligible for section 212(c) waiver to place themselves in exclusion proceedings is the assumption that a rational Congress would want these persons to leave the country. This is inconsistent with the fact that, by creating section 212(c) waiver, Congress explicitly identified this group of aliens as desirable for reentry to the country, subject

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[2] The majority responds that the government may "exclude those it believes are less likely to obtain relief." If we are going to assume that LPRs will be fully informed, in advance, about the differing availabilities of relief in deportation and exclusion proceedings and will make rational, calculated decisions about voluntarily leaving the country in order to initiate an exclusion proceeding, we should also assume these individuals will take into account the likelihood of obtaining relief. Those unlikely to obtain relief are equally unlikely to take the risk of leaving the country. The majority's speculation does nothing to undermine the point that there is no support for the notion that encouraging "self-deportation" will save government resources.

to the Attorney General's discretion. This is not a group of aliens who, if they are identified, will necessarily be removed from the country. Rather, this is a group of aliens whom Congress has deemed worthy to remain in the country, in spite of having been convicted of particular crimes.[3] This is the group that is being sorted based on whether or not they have recently departed and reentered the country. There is simply no logical reason to discriminate between persons whom Congress has deemed worthy – subject to the discretion of the Attorney General – of remaining in the country based on whether or not they have recently departed the country.[4] As low a threshold as the rational basis test is, this statutory scheme does not pass.

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[3] At the risk of stating the obvious, making section 212(c) relief available only in exclusion proceedings would not encourage aliens to leave the country permanently, but would only encourage them – again, if at all – to leave and immediately reenter so as to take advantage of section 212(c) waiver.

[4] The majority responds that "it makes perfect sense to want [an LPR] to be outside our borders when" he learns that he will not receive relief. However, as discussed above, an LPR who is stopped at the border for being excludable but who is also eligible for § 212(c) relief will generally be admitted and continue the relief application from within the country. Thus, if he is ultimately denied relief, he will, in fact, be inside our borders when he gets "the bad news."

The majority, I respectfully suggest, quotes Judge Posner out of context. Judge Posner was addressing the rationale for allowing the option of voluntary departure, which occurs *after* a deportation proceeding has been initiated. *See LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir.1998).

B

The majority's dismissal of the constitutional problem in the text of section 212(c) also implicitly casts considerable doubt on the constitutionality of a federal regulation. After the Supreme Court held that IIRIRA does not apply retroactively to deny section 212(c) relief to aliens who plead guilty to a charge which would otherwise make them eligible for a section 212(c) waiver prior to the enactment of IIRIRA, *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the Department of Homeland Security ("DHS") promulgated 8 C.F.R. § 1212.3 to codify the holding in *St. Cyr*. That regulation provides that, assuming an alien in a deportation proceeding meets other requirements, the alien is eligible for section 212(c) relief unless "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. § 1212.3(f)(5).[5] The regulation thus proceeds on the long-standing assumption, which the majority has now overruled in our Circuit, that section 212(c) is applicable to both deportation and exclusion proceedings.

By holding that the statutory language of section 212(c) is clear and that *Francis* and *Tapia-Acuna* did not "accord[ ] sufficient deference" to Congress, the

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[5] The BIA relied on this regulation in affirming the denial of section 212(c) relief to Abebe.

majority has implicitly questioned DHS's authority to enact the above regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the agency, must give effect to the unambiguously expressed intent of Congress."). Under the majority rule, the regulation that has been applied in thousands of cases cannot survive. Those who were eligible to apply for relief yesterday under the regulation are on very uncertain ground today.

C

There is, in sum, no reason to depart from our long-established precedent, developed over many decades in this Circuit and every other. The BIA has acted in reliance on it, and the government has exercised its discretion based on this precedent to grant relief to thousands of individuals. There is no justification for casting the system aside now and throwing thousands of pending applications for section 212(c) relief into question, particularly when it is unnecessary to the resolution of this petition to do so.

II

Applying the constitutional analysis discussed in Part I to the present case, I would hold that Abebe is eligible for section 212(c) relief because the specific offense which makes him deportable would also make him excludable. Equal protection demands that we

treat equally aliens similarly situated. In cases such as this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the government chooses to use to deport the aliens. To clarify our caselaw and to bring it into proper constitutional alignment, I would overrule *Komarenko v. INS*, 35 F.3d 432 (9th Cir.1994) (applying a comparable grounds test), and follow the lead of the Second Circuit's well-articulated opinion in *Blake,* 489 F.3d 88 (applying an offense-specific test).

As Judge Berzon explained in her thoughtful concurrence to the panel opinion in this case, the comparable ground approach adopted in *Komarenko* is irreconcilable with the equal protection analysis discussed in Part I, *supra,* and in *Tapia-Acuna.* Indeed, the comparable ground approach creates new problems. Just as the distinction between deportable aliens who are alike except that one temporarily left the country while the other did not is arbitrary, the comparable grounds test turns on equally arbitrary grounds.

Consider Alien A, who commits assault with a deadly weapon. He is deportable because his offense falls into the category "aggravated felonies." He is also excludable because that same offense falls into the category "crimes involving moral turpitude." In an exclusion proceeding, his offense, as a "crime of moral turpitude," would make Alien A eligible for a § 212(c) waiver. If he ends up in deportation proceedings, however, he is not eligible for § 212(c) relief, under the comparable grounds test, because the

category "aggravated felonies" is sufficiently different from the category of "crimes involving moral turpitude." Alien B, on the other hand, who commits a drug offense is also both deportable and excludable, but is eligible for § 212(c) relief in a deportation proceeding simply because drug offenses were described with similar words in the deportation and exclusion statutes.

This type of classification between aliens who are otherwise similarly situated violates equal protection unless it is rationally related to a legitimate government interest. *Jimenez-Angeles v. Ashcroft,* 291 F.3d 594, 603 (9th Cir.2002). Congress is surely informed by important policy considerations when making determinations about which *offenses* make an alien deportable or excludable. Decisions about the size, scope, and overlap of *categories* of deportable and excludable offenses have no rational relation to judgments about which aliens should be permitted to remain in our country and which should not.

As Judge Berzon pointed out, there is one additional inconsistency between the comparable grounds test and the way that section 212(c) relief functions as a practical matter. Once an alien receives a waiver of excludability under either section 212(c) or other waiver provisions, the alien cannot be deported or excluded in the future solely due to the offense on which he received the waiver. This is true even if there is a category of deportable crimes that applies to his offense which is different from the category that permitted the waiver. *See, e.g., Matter of Balderas,* 20

I. & N. Dec. 389, 392 (BIA 1991). In other words, section 212(c) relief is itself offense-specific, not ground-specific.

III

Additionally, I respectfully dissent from the majority's holding that Abebe did not exhaust his claim for withholding of removal. Abebe raised this claim in his notice of appeal before the BIA. The purpose of the administrative exhaustion requirement is so that the "administrative agency [may] have a full opportunity to resolve a controversy or correct its own errors before judicial intervention." *Sagermark v. INS,* 767 F.2d 645, 648 (9th Cir.1985). When a petitioner raises an issue in his notice of appeal, the BIA has a "full opportunity to resolve [the] controversy," particularly in light of the fact that the petitioner is not required to file an accompanying brief. *See* 8 C.F.R. § 3.38(f) (1999) ("Briefs *may* be filed by both parties. . . ." (emphasis added)). *Ladha v. INS,* 215 F.3d 889, 903 (9th Cir.2000), was correctly decided. I would hold that Abebe exhausted his claim for withholding of removal and would thus remand to the BIA for consideration of the claim in the first instance.

IV

For all of these reasons, I would find Abebe eligible for section 212(c) relief. To classify aliens based on the happenstance of whether they have

recently departed the country and reentered furthers no logical government interest. Similarly, to classify aliens in deportation proceedings whose deportable offense is also a ground for exclusion based on the agency-created category into which the offense happens to fall serves no legitimate government interest. I would hold, following the Second Circuit in *Blake,* 489 F.3d 88, that an alien in a deportation proceeding is eligible for section 212(c) relief if the offense which makes him deportable would also render him excludable. Applying section 212(c) relief to deportation proceedings using an offense-based analysis is the only constitutional interpretation of the statute. In addition, I would hold that Abebe exhausted his claim for withholding of removal and allow him to pursue that claim on remand. *Tapia-Acuna,* 640 F.2d 223, and *Ladha,* 215 F.3d 889, were rightly decided. *Komarenko,* 35 F.3d 432, should be overruled.

Like the Second Circuit in *Blake,* 489 F.3d at 91, I find Judge Learned Hand's caution particularly apt here: "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." *Di Pasquale v. Karnuth,* 158 F.2d 878, 879 (2d Cir.1947). There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not.

For these reasons, I respectfully dissent.

493 F.3d 1092

United States Court of Appeals,
Ninth Circuit.
Yewhalashet ABEBE, Petitioner,
v.
Alberto R. GONZALES, Attorney General,
Respondent.
No. 05-76201.

Argued and Submitted Dec. 4, 2006.
Filed July 9, 2007.

Robert B. Jobe and Fatma Marouf, Law Office of Robert B. Jobe, San Francisco, CA, (briefed), Zachary Nightingale, Van Der Hout, Brigagliano & Nightingale, LLP, San Francisco, CA, (argued), for the petitioner.

Song E. Park (briefed) and John C. Cunningham (argued), United States Department of Justice, Office of Immigration Litigation, Washington, D.C., for the respondent.

Zachary Nightingale and Avantika Shastri, Van Der Hout, Brigagliano & Nightingale, LLP, San Francisco, CA, filed a brief for the Immigration Law Clinic of the School of Law at the University of California, Davis, the Immigrant Legal Resource Center, and the National Immigration Project of the National Lawyers Guild as amici curiae in support of petitioner.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A26-810-941.

Before: D.W. NELSON, ROBERT E. COWEN,* and MARSHA S. BERZON, Circuit Judges.

Opinion by Judge D.W. NELSON; Concurrence by Judge BERZON.

D.W. NELSON, Senior Circuit Judge:

Yewhalashet Abebe ("Abebe" or "Petitioner") seeks review of a decision by the Board of Immigration Appeals ("BIA" or "Board") finding him ineligible to apply for discretionary relief from removal under former section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) (Supp. IV 1992) (repealed 1996),[1] because the ground of deportability charged by the government – conviction of an "aggravated felony" within the meaning of INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), which defines the term to include "sexual abuse of a minor" crimes – lacks a comparable ground of inadmissibility under INA § 212(a), 8 U.S.C. § 1182(a). Abebe further challenges the BIA's refusal to review a claim raised in connection with his application for withholding of removal under INA § 241(b), 8 U.S.C. § 1231(b). We perceive no error with respect to the availability of § 212(c) relief and deny the petition on that issue. In a separate memorandum disposition filed concurrently

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

[1] Unless otherwise indicated, statutory references are to the INA. Parallel citations to the United States Code are provided occasionally.

herewith, we remand to the Board for an initial determination on the merits of the withholding claim.

I. BACKGROUND[2]

Petitioner is a citizen of Ethiopia who entered the United States as a refugee and became a lawful permanent resident ("LPR") in 1984. In 1992, pursuant to a guilty plea, Abebe was convicted of committing "lewd/lascivious conduct upon a child" in violation of California Penal Code § 288(a). He was sentenced to one year in jail and three years of supervised probation. In addition, Abebe was required to register as a sex offender and to provide registration updates to local police within five days of his birthday for each year he remained in California. After serving his sentence, Petitioner's only other contact with the criminal justice system occurred in 2001 when he failed to renew his sex offender registration by the statutory deadline. He was convicted of an offense under California Penal Code § 290(g)(2) and sentenced to 120 days in jail.

In 2005, the government commenced removal proceedings asserting that Abebe was deportable on the independent grounds that he (1) had been convicted of two crimes involving moral turpitude ("CIMT"), INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii); and

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[2] In this opinion, we recount only those facts relevant to the denial of § 212(c) relief, and we omit facts pertinent to the withholding of removal claim.

(2) had been convicted of an aggravated felony, INA § 237(a)(2)(A)(iii) – namely, the 1992 "sexual abuse of a minor" conviction. The IJ dismissed the first charge after the government conceded that Abebe's failure to update his sex offender registration was not a CIMT. The second charge was sustained. Abebe does not contest the finding of removability.

Petitioner sought several forms of relief from removal including a discretionary waiver of inadmissibility authorized by former § 212(c). Although § 212(c) was repealed in 1996, because Abebe's 1992 conviction was obtained through a guilty plea, if he "would have been eligible for § 212(c) relief at the time of [his] plea under the law then in effect," he remained so during the removal proceedings. *INS v. St. Cyr,* 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (holding that Congress did not unmistakably indicate an intention to apply the repeal of § 212(c) retroactively to aliens who may have relied on its availability in deciding whether to forgo their right to a criminal trial). At the time of Abebe's plea, § 212(c) stated that

> [a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [(establishing classes of aliens to be excluded from admission to the United States)]. . . . The first

> sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c) (Supp. IV 1992).

On the face of the statute, § 212(c) does not apply to Abebe's case because he is not returning from a temporary overseas journey and is not facing exclusion from admission to the United States under § 212(a) but, instead, is being deported from the interior of the country on the authority of § 237(a). However, as described below, through a decades-long series of administrative and judicial decisions, the Attorney General's statutory authority to grant relief from *exclusion* has been interpreted to carry with it a similar authority to grant relief from *deportation* under certain circumstances. Even so, the IJ held that there was no authority to grant relief to Abebe because the ground of deportability sustained – conviction of an aggravated felony/sexual abuse of a minor crime – lacked a comparable charge of inadmissibility under § 212(a).

Relying on *Matter of Blake,* 23 I. & N. Dec. 722 (BIA 2005), and a recently promulgated regulation, 8 C.F.R. § 1212.3(f)(5), the BIA affirmed. In his petition for review, Abebe argues that the Board's interpretation of former § 212(c) must be rejected because: (1) it is invalid as a matter of statutory construction;

(2) it violates principles of equal protection; and (3) it is impermissibly retroactive as applied to him.[3] We disagree. In so doing, we join the First, Third, Fifth, and Seventh Circuits, *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir.2007); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir.2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir.2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir.2007); *Avilez-Granados v. Gonzales*, 481 F.3d 869 (5th Cir.2007); *Vo v. Gonzales*, 482 F.3d 363 (5th Cir.2007); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir.2007); *see also Rubio v. U.S. Atty. Gen.*, 182 Fed.Appx. 925 (11th Cir.2006) (unpublished), and part ways with the Second, *Blake v. Carbone*, 489 F.3d 88 (2d Cir.2007).

II. STATUTORY BACKGROUND – HISTORY OF § 212(c)

The immigration laws have long distinguished between the exclusion of non-citizens seeking to enter the United States and the deportation of those who have already crossed our borders. *See* Immigration Act of 1917 ("1917 Act") §§ 3, 19, 39 Stat. 875, 889

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[3] Abebe also takes issue with *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005), decided shortly after *Blake*. In *Brieva-Perez*, the BIA applied the comparable grounds test to deny § 212(c) relief to an alien found deportable due to a conviction characterized as a "crime of violence" and hence an aggravated felony under INA § 101(a)(43)(F). The attacks leveled against *Brieva-Perez* are identical to the *Blake* challenges and are rejected for the same reasons.

(defining classes of excludable[4] and deportable aliens respectively); Immigration and Nationality Act of 1952 ("1952 Act") §§ 212, 241, 66 Stat. 182, 204 (same).[5] There is no question that Congress has the power to establish different standards for admission into the United States and deportation therefrom. For instance, it was certainly rational for Congress to turn away aliens at the border who were "afflicted with ... loathsome or dangerous contagious disease[s]," 1917 Act § 3, 39 Stat. 875, but to allow aliens who contracted such diseases after entry to remain. The immigration laws generally reflect a policy choice that what might count as a good reason to deny admission to a first-time entry-seeker might not be a good reason to expel a resident alien who has developed ties to this country. However, in many cases, an alien who has once surmounted the initial

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[4] The terms "excludable" and "inadmissible" are synonymous and will be used interchangeably in this opinion.

[5] In addition to the substantive differences, prior to 1997, the immigration laws provided for separate exclusion and deportation proceedings. The procedural dissimilarities were largely eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, Div. C., Title III, Subtitle A, 110 Stat. 3009-575 *et seq.*, and replaced by a unified "removal" process under INA § 240, 8 U.S.C. § 1229a. The homogenization is not complete, however, and certain procedural niceties continue to depend on whether an alien is seeking admission or is charged with deportability. *See, e.g.*, INA § 240(c), 8 U.S.C. § 1229a(c) (describing differences in burden of proof). The substantive distinctions between inadmissibility and deportability remain. INA §§ 212(a), 237(a), 8 U.S.C. § 1182(a), 1227(a).

barriers to admission will nevertheless be assimilated to the position of a first-time entry-seeker if he travels outside the territorial United States and attempts to return.[6] This system makes travel hazardous for the long-term resident and conflicts with the intuitive appeal of the exclusion/deportation distinction.

Consequently, the immigration laws historically provided preferential treatment to long-term resident

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[6] This is a simplification. Whether an alien who gains admission at one time and subsequently travels abroad must face the same barriers to (re)entry as a first-time visitor is a complex matter. In the early immigration cases, if a previously admitted alien "departed from the country, even for a brief space of time[,] . . . he subjected himself to . . . exclusion" upon his return. *Lewis v. Frick*, 233 U.S. 291, 297, 34 S.Ct. 488, 58 L.Ed. 967 (1914); *see also, e.g., United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425, 53 S.Ct. 665, 77 L.Ed. 1298 (1933); *Dollar S.S. Line v. Hyde*, 23 F.2d 910, 911 (9th Cir.1928). Over time, however, some traveling long-term resident aliens were effectively exempted from the grounds of excludability. The 1952 Act provided that a long-term LPR whose departure from the United States was unintentional or involuntary would not be deemed to be seeking entry upon his return. 1952 Act § 101(a)(13), 66 Stat. 167. In *Rosenberg v. Fleuti*, 374 U.S. 449, 462-63, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963), the Supreme Court held that an LPR returning from an innocent, casual, and brief overseas excursion not intended to meaningfully interrupt his immigration status would not be deemed to be seeking entry. In 1996, IIRIRA § 301(a) modified the statutory text and established six alternative conditions, at least one of which is necessary to finding that an LPR is "seeking an admission" into the United States. 110 Stat. 3009-575 (codified at 8 U.S.C. § 1101(a)(13)(C)). We express no opinion as to whether IIRIRA displaced the former rules.

aliens who sought to re-enter the United States after a trip abroad. Congress could have exempted such aliens from the excludability tests altogether but generally chose not to take this approach.[7] Instead, long-term residents returning to the United States have been the beneficiaries of provisions authorizing *discretionary relief* from the grounds of exclusion.

An early version was codified in the seventh proviso to § 3 of the 1917 Act which allowed "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years [to] be admitted in the discretion of the Secretary of Labor" notwithstanding membership in an excluded class. 39 Stat. 878.[8] In this way, Congress diminished the risks faced by long-term resident aliens who traveled abroad.

Although the seventh proviso only authorized relief from the process of exclusion at the border, it was extended into the deportation context because of the overlap between certain deportation and exclusion provisions. An early case involved a Yugoslavian citizen who attained legal resident status in 1909 and was convicted of larceny – a crime involving moral

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[7] *But see* note 6, *supra*, describing circumstances under which traveling long-term residents were not deemed to be seeking entry upon their return.

[8] Responsibility for enforcement of the immigration laws was subsequently transferred to the Department of Justice and the Attorney General. *St. Cyr*, 533 U.S. at 294 n. 2, 121 S.Ct. 2271.

turpitude – in 1924. *Matter of L-*, 1 I. & N. Dec. 1, 1 (BIA, Att'y Gen.1940). Under the law then in effect, if an alien committed a CIMT within five years of entry and was sentenced to a term of one year or more he would be deportable. 1917 Act § 19, 39 Stat. 889. Because of the date of the crime and the length of his sentence, Mr. L was not deportable under that provision. *Matter of L-*, 1 I. & N. Dec. at 1-3. However, the conviction placed Mr. L within one of the classes to be *excluded* from admission. 1917 Act § 3, 39 Stat. 875 (excluding any person convicted of a CIMT regardless of sentence length or date of commission).

In 1939, Mr. L traveled to Yugoslavia for two months and returned to the United States. 1 I. & N. Dec. at 2. Upon reentry, Mr. L's excludability was not detected and he was allowed to return to the United States. *Id.* Several months later, he was arrested and charged with *deportability* under a different clause of § 19 that rendered removable any alien convicted of a CIMT prior to entry. *Id.* at 1-2. The conviction at issue was, of course, the very same 1924 larceny conviction that ought to have made him excludable (and seventh-proviso-eligible) at the time of his 1939 re-entry to the United States. *Id.* at 1-2.

The Attorney General noted that despite the facial limitation of seventh proviso authority to exclusion proceedings, to deny relief simply because Mr. L found himself in deportation proceedings would have frustrated the purpose of the provision. *Id.* at 5. The seventh proviso was meant to diminish the risks of overseas travel by long-term residents. In this case,

the failure of the authorities to challenge Mr. L's re-entry converted the ground of excludability triggered by his travel into a ground of deportability for which relief appeared to be unavailable.

> Granted that respondent's departure in 1939 exposed him on return to the peril of a fresh judgment as to whether he should be permitted to reside in the United States, such judgment ought not to depend upon the technical form of the proceedings. . . . [The petitioner] should be permitted to make the same appeal to discretion that he could have made if denied admission in 1939, or that he could make in some future application for admission if he now left the country.

Id. at 5-6.

The Attorney General therefore determined that he had authority during deportation proceedings to enter a *nunc pro tunc* correction of the record of Mr. L's last entry to reflect a grant of seventh proviso relief. *Id.* at 6. Further, as a result of the retroactive relief from excludability, Mr. L was not deportable under § 19 because "the only ground for deportation is one that might have been removed by discretionary action at [the time of the last entry]." *Id.* The ground of exclusion for which relief was granted, 1917 Act § 3 (excluding "persons who have been convicted of . . . a felony or other crime or misdemeanor involving moral turpitude"), was essentially identical to the corresponding ground of deportation, 1917 Act § 19 ("any alien who was convicted . . . prior to entry, of a felony

or other crime or misdemeanor involving moral turpitude" is deportable). Other early cases approved a modest extension of seventh proviso relief into the deportation context where there was a tight connection between the ground of deportability and a corresponding ground of excludability. *See, e.g., Matter of A-*, 2 I. & N. Dec. 459 (BIA 1946, Att'y Gen.1947).

Section 212 of the Immigration and Nationality Act of 1952 replaced and roughly paralleled § 3 of the 1917 Act and subsection (c) took the place of the seventh proviso.[9] The BIA continued the pre-1952 practice of extending relief into the deportation context where the ground of deportability charged was closely allied to an inadmissibility ground. *See, e.g., Matter of G-A-*, 7 I. & N. Dec. 274, 274 (BIA 1956).

In line with the rationale of the earlier cases, aliens seeking § 212(c) relief in deportation proceedings were required to have *actually traveled abroad* after becoming deportable. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971) *aff'd by Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir.1972). In *Arias-Uribe*, an alien faced deportation for a narcotics conviction under § 241(a)(11) – a ground that had long been established to correspond to the § 212(a)(23) ground of excludability. 13 I. & N. Dec. at 696-97. However, Arias-Uribe did not leave the United States following

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[9] Section 212(c) did not give the Attorney General authority to waive the national security and documentation grounds of excludability listed in §§ 212(a)(26)-(29). 66 Stat. 184 (1952).

his crime and therefore never faced exclusion. *Id.* As a result, the *nunc pro tunc* procedure outlined in *Matter of L-* and other cases was not possible. *Id.* at 697-98.

Under the 1917 Act an alien who had not departed from the United States after becoming deportable could nevertheless utilize the seventh proviso. This was accomplished by granting the alien advance permission to depart voluntarily and return, at which time his excludability would be waived. *Matter of L-*, 1 I. & N. Dec. at 5; *see also, e.g., Matter of A-*, 2 I. & N. Dec. at 461-63. However, Arias-Uribe could not employ this procedure under the 1952 Act. *Arias-Uribe,* 13 I. & N. Dec. at 700; *see also Arias-Uribe,* 466 F.2d at 1199; *Francis v. INS,* 532 F.2d 268, 271-72 (2d Cir.1976).

As a result, an LPR who wished to take advantage of § 212(c) would be required to leave the United States following the event that rendered him deportable. If mistakenly allowed to re-enter without challenge, he could invoke § 212(c) in later deportation proceedings using the *nunc pro tunc* procedure. In contrast, if the alien remained in the United States and was placed in deportation proceedings, § 212(c) relief was unavailable.

In 1976, the Second Circuit upheld a constitutional challenge asserting that these practices "create[d] two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable." *Francis,* 532 F.2d at

272. The court determined under the "minimal scrutiny test" that the disparate treatment applied to members of these classes was not rationally related to any legitimate purpose of the statute and therefore violated the petitioner's right to equal protection of the laws as guaranteed by the Fifth Amendment. *Id.* The BIA acquiesced in the Second Circuit's decision and withdrew from its position in *Arias-Uribe. Matter of Silva,* 16 I. & N. Dec. 26, 30 (BIA 1976). This court subsequently followed suit. *Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir.1981).

Although intended to ameliorate the hazards of re-entry faced by long-term residents, § 212(c) was now available to aliens who never traveled at all. However, the BIA has resisted further departures from the statutory text and consistently held that relief is available only for aliens facing deportation on a ground with some tight connection to a ground of excludability that could have been waived under § 212(c) had the alien traveled abroad.

As noted above, most of the early cases involved the CIMT deportation ground which was essentially identical to the CIMT ground of excludability. *See, e.g., Matter of L-,* 1 I. & N. Dec. at 1; *Matter of A-,* 2 I. & N. Dec. at 459. It is also well established that § 212(c) authorizes relief from the narcotics-related grounds of deportation because they have specific counterparts in the grounds of excludability. *Tapia-Acuna,* 640 F.2d at 224; *Matter of Meza,* 20 I. & N. Dec. 257, 258-59 (BIA 1991).

In contrast, the BIA and the courts have regularly denied relief where the ground of deportability lacks a corresponding ground of excludability. For example, aliens charged with deportability for certain weapons offenses, *Matter of Granados,* 16 I. & N. Dec. 726 (BIA 1979); *Cabasug v. INS,* 847 F.2d 1321 (9th Cir.1988); *Komarenko v. INS,* 35 F.3d 432 (9th Cir.1994), immigration document fraud, *Matter of Wadud,* 19 I. & N. Dec. 182 (BIA 1984), and entry without inspection, *Matter of T-,* 5 I. & N. Dec. 389, 389-90 (BIA 1953); *Matter of M-,* 5 I. & N. Dec. 642, 647 (BIA 1954); *Leal-Rodriguez v. INS,* 990 F.2d 939, 949-52 (7th Cir.1993), have all been deemed ineligible for relief on this basis.

In the 1990s, § 212(c) was restricted and eventually eliminated through a series of amendments. The Immigration Act of 1990 ("IMMACT 90") stripped eligibility from any alien who had been convicted of an aggravated felony and served five years or more in prison. Pub.L. No. 101-649, § 511, 104 Stat. 4978, 5052.[10] On April 24, 1996, section 440(d) of the Anti-terrorism and Effective Death Penalty Act ("AEDPA")

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[10] The "aggravated felony" deportation ground was created by the Anti-Drug Abuse Act of 1988 ("ADAA") and was defined narrowly to include murder, drug trafficking, and weapons trafficking. Pub.L. No. 100-690, §§ 7342, 7344, 102 Stat. 4181. Since that time, the number of offenses classified as aggravated felonies has exploded. *See, e.g.,* Immigration and Nationality Technical Corrections Act of 1994, Pub.L. No. 103-416, § 222, 108 Stat. 4305, 4320-22; IIRIRA, Pub.L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 to -628.

stripped § 212(c) eligibility from any alien deportable because of an aggravated felony conviction (regardless of the length of the sentence), a drug conviction, multiple CIMTs, or certain weapons and national security violations. Pub.L. No. 104-132, § 440(d), 110 Stat. 1277; *St. Cyr,* 533 U.S. at 297 n. 7, 121 S.Ct. 2271. Finally, in that same year, IIRIRA entirely repealed § 212(c) for proceedings commenced on or after April 1, 1997. Pub.L. No. 104-208, § 304(a)(3), (b), 110 Stat. 3009-594 to -597; *St. Cyr,* 533 U.S. at 297, 121 S.Ct. 2271.

However, in 2001 the Supreme Court decided that § 212(c) relief remains available for aliens who pled guilty prior to AEDPA and/or IIRIRA and who "would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *St. Cyr,* 533 U.S. at 326, 121 S.Ct. 2271. In August 2002, the Department of Justice ("DOJ") published proposed amendments to its regulations that were meant to codify the requirements for former § 212(c) relief in the wake of AEDPA, IIRIRA, and *St. Cyr.* 67 Fed.Reg. 52627 (August 13, 2002). The DOJ noted that, among other things, "an applicant must, at a minimum meet the criteria . . . [that he] is deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility." *Id.* at 52628-29. The final rule was published on September 28, 2004. 8 C.F.R. § 1212.3(f)(5).

In 2005, the Board decided that an alien who was deportable for an aggravated felony "sexual abuse of a minor" conviction was ineligible for § 212(c) relief

on the basis of the comparable grounds rule. *Blake,* 23 I. & N. Dec. at 723. The Board noted that the only ground of inadmissibility that was potentially comparable to the aggravated felony/sexual abuse of a minor ground of deportation was § 212(a)(2)(A)(i)(I) (rendering most aliens with CIMT convictions inadmissible). *Id.* at 723-28. The Board held that while the "coverage of the offenses described [by the deportation and exclusion provisions] need not be a perfect match in order to be 'statutory counterparts,'" *id.* at 729, "Congress [must have] employed similar language to describe substantially equivalent categories of offenses," *id.* Reasoning that because "the moral turpitude ground of exclusion addresses a . . . much broader category of offenses than the aggravated felony sexual abuse of a minor charge," *id.* at 728, the BIA held that Congress had not signaled an intention to treat the categories as essentially equivalent. In *Matter of Brieva,* 23 I. & N. Dec. at 770-73, the Board employed the same analysis to find that the aggravated felony "crime of violence" ground of deportability was incongruous with the CIMT ground of inadmissibility. The validity of the *Blake* and *Brieva* holdings are matters of first impression in this circuit.

III. ANALYSIS

A. Jurisdiction and Standard of Review

We have jurisdiction under 8 U.S.C. § 1252 to address the constitutional and legal questions presented

in Abebe's petition. *See Morales-Alegria v. Gonzales,* 449 F.3d 1051, 1053 (9th Cir.2006). We review *de novo* the BIA's determination of purely legal questions. *Simeonov v. Ashcroft,* 371 F.3d 532 (9th Cir.2004). However, the principles of deference to administrative agency decisions established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), are applicable when a court reviews the BIA's interpretation of the Immigration and Nationality Act. *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). Where, as here, a provision of the INA is subject to more than one interpretation, we ask only whether the BIA's interpretation is a reasonable one. *Vasquez-Lopez v. Ashcroft,* 343 F.3d 961, 969-70 (9th Cir.2003).

Abebe argues that the *Blake* holding is not owed deference (1) because it raises serious constitutional concerns – both in terms of equal protection and retroactivity; and (2) because it conflicts with the statute, regulations, and prior caselaw. While it is true that an agency's construction of its governing statute must be rejected if it raises serious constitutional concerns and "a less constitutionally troubling construction is readily available," *Williams v. Babbitt,* 115 F.3d 657, 666 (9th Cir.1997), we address the non-constitutional issues first.

B. Non-Constitutional Issues

1. Consistency with the Statute

Abebe argues that *Blake* is inconsistent with the text of § 212(c) as it stood at the time of his guilty plea in 1992.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily . . . and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) . . . *The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of at least 5 years.*

8 U.S.C. § 1182(c) (Supp. IV 1992) (emphasis added).

Abebe draws our attention to the final sentence which was added by IMMACT 90, Pub.L. No. 101-649, § 511(a), 104 Stat. 4978, 5052, and argues that by barring § 212(c) relief to a *subset* of aggravated felons (those who had served at least five years), Congress expressed an intent to render all other aggravated felons eligible for relief. This argument fails.

At the time this sentence was added, BIA and court precedent had for many years indicated that § 212(c) relief was available only to those aliens charged as deportable on a ground comparable to a

ground of exclusion. *See Matter of T-*, 5 I. & N. Dec. at 389-90; *Matter of Granados*, 16 I. & N. Dec. at 728; *Matter of Wadud*, 19 I. & N. Dec. 182; *Cabasug*, 847 F.2d at 1326 (holding § 212(c) relief unavailable unless the ground of deportation was "substantially identical in the exclusion and deportation statutes"). Congress is presumed to be familiar with the background of existing law when it legislates, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and therefore knew that some aggravated felons would fail to qualify for § 212(c) relief altogether. By its amendment, Congress clearly intended to *further limit* § 212(c) relief rather than to expand its availability. "If Congress intended to overturn the practice requiring comparability, it could have done so explicitly." *Vo*, 482 F.3d at 370; *see also Campos v. INS*, 961 F.2d 309, 314 (1st Cir.1992) (rejecting similar claim). Abebe has not shown that the Board's interpretation of the statute is impermissible.

2. Consistency With the Regulations

Abebe also alleges that the *Blake* holding is inconsistent with 8 C.F.R. § 1212.3(f) which provides in relevant part,

> An application for relief under former section 212(c) of the Act shall be denied if
>
> . . .
>
> (4) The alien [is] removable on the basis of . . . an aggravated felony, except as follows:

> (i) An alien whose . . . aggravated felon[y convictions] were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a [five year] . . . term of imprisonment . . . , and
>
> (ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.

8 C.F.R. § 1212.3(f) (2004).

Abebe reasons that by specifying that an alien who pleaded guilty between November 29, 1990 and April 24, 1996 is ineligible *only if* he has served five years, subsection (f)(4)(i) implies that an alien in a similar situation but who served less than five years is eligible for relief. Abebe misreads the regulation. On a much more plausible reading, an alien who pleaded guilty during this time frame is stripped of § 212(c) eligibility *by the workings of 8 C.F.R. § 1212.3(f)(4)* only if he also served a five-year term. If an alien was ineligible for some other reason (say because he was not an LPR (8 C.F.R. § 1212.3(f)(1))) or was deportable on a ground lacking a comparable ground of exclusion (8 C.F.R. § 1212.3(f)(5)), then it would make no difference whether or not he served five years.

Abebe's argument that *Blake* conflicts with 8 C.F.R. § 1212.3(f)(4)(ii) is similarly unpersuasive.

That provision was added in response to this court's decision in *Toia v. Fasano*, 334 F.3d 917 (9th Cir.2003), which held that IMMACT 90's amendment to § 212(c) (stripping eligibility from aggravated felons who served five years) could not be applied retroactively to aliens who pleaded guilty prior to its enactment. 69 Fed.Reg. 57830-31 (September 28, 2004). The Department of Justice acquiesced in the result of *Toia* and promulgated subsection (f)(4)(ii) to make clear that such an alien would not be stripped of eligibility *as a result of IMMACT 90's amendment. Id.* The regulation in no way provides affirmative entitlement to relief to an alien who would have been ineligible *for some other reason* (for instance, if the ground of removability charged lacked a comparable ground of inadmissibility).

3. Consistency With Prior Agency Practice

Abebe also argues that the *Blake/Brieva* rule conflicts with past Board interpretations of the statutory counterpart requirement and is therefore "entitled to considerably less deference." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). This contention deserves careful consideration. If it is true that the BIA consistently interpreted the comparable grounds test one way and then reversed course without adequate explanation, *Blake* might represent "an arbitrary and capricious change from agency practice," *Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005), unworthy of *Chevron* deference.

However, Abebe's premise is false – the BIA has not recently changed course but rather has maintained a consistent position for many years. As noted above, § 212(c) has generally not been interpreted as a form of relief applicable to *all* grounds of deportability.[11] Rather, it has been said that "if a ground of deportation is also a ground of inadmissibility . . . section 212(c) can be invoked in a deportation hearing." *Matter of Salmon,* 16 I. & N. Dec. 734 (BIA 1978). Abebe would have us believe that despite language comparing the *ground* of deportability charged with the *grounds* of excludability listed in § 212(a), the Board has, in practice, engaged in a subtly different sort of analysis. Namely, Abebe suggests that before *Blake,* the BIA compared the *specific conduct* rendering an alien deportable with the grounds of exclusion in § 212(a). It would follow, under this approach, that if an alien whose conduct – say engaging in the sexual abuse of a minor – would render him excludable for committing a CIMT, then § 212(c) would be available in deportation proceedings regardless of the ground of deportation alleged by the government.

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[11] As a lone exception, the BIA did interpret § 212(c) in this manner for a brief period in 1990 but the Attorney General reversed the Board's opinion in March 1991. *See Matter of Hernandez-Casillas,* 20 I. & N. Dec 262 (BIA 1990, Att'y Gen.1991).

Abebe asserts that *Matter of Granados* supports his position. In that case, the BIA denied § 212(c) relief because "[c]onviction for possession of a . . . sawed-off shotgun [(the ground of excludability under § 241(a)(14))] is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable under section 212(a)(9) of the Act." 16 I. & N. Dec. at 728. Petitioner seizes on the second half of this sentence and claims that whenever an alien's conduct could expose him to the CIMT ground of excludability, he is eligible for § 212(c) relief. We need not decide if this is an accurate statement of the BIA's position when *Granados* was decided, because it was clearly repudiated in 1984.

In *Matter of Wadud,* an alien was found deportable under § 241(a)(5) for an immigration document fraud conviction. 19 I. & N. Dec. at 184 n. 2. Mr. Wadud sought § 212(c) relief on the theory that the conduct supporting his conviction, and hence his deportability under § 241(a)(5), involved moral turpitude and that he was therefore excludable under § 212(a)(9) (CIMT). The BIA soundly rejected this argument characterizing its statement in *Granados* as dicta. *Id.* at 185. More importantly, the BIA clarified that the appropriate test was concerned only with the "*ground of deportability charged,*" *id.* (emphasis added), and its equivalence with some specified ground of exclusion.

In *Matter of Meza,* decided after the ADAA introduced the aggravated felony provisions, the Board

reiterated the basic rule that a § 212(c) "waiver is available in deportation proceedings only to those aliens who have been found deportable under a ground of deportability for which there is a comparable ground of excludability." 20 I. & N. Dec. at 258. In that case, the BIA reversed the denial of § 212(c) relief sought by an alien charged with deportability under a provision that defined "illicit trafficking in any controlled substance" as an "aggravated felony." *Id.* at 259. The IJ made the facile conclusion that because there was no "aggravated felony" ground of exclusion in § 212(a), § 212(c) relief was unavailable. *Id.* The board rejected the IJ's reasoning but did *not* reject a grounds-based approach. *Id.* Rather, it noted that the aggravated felony ground of deportability essentially incorporated by reference § 101(a)(43) of the Act which in turn "refers to several types or categories of offenses." *Id.* Because the specific category of aggravated felony at issue – drug trafficking offenses – was comparable to the drug trafficking ground of exclusion in § 212(a)(23), the Board found the alien eligible for § 212(c) relief. *Id.* Therefore, *Meza* does not support Abebe's position.

Abebe also points to *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587 (BIA 1992). In that case, an alien was found deportable by an IJ both on aggravated felony and firearms grounds. *Id.* at 589. Because it was well settled that § 212(c) was unavailable for aliens facing deportation for firearms offenses, the IJ denied relief. *Id.* The BIA reversed the finding of

deportability on the firearms charge and remanded. *Id.* at 591. The case does not address whether, on remand, the alien may have been ineligible for relief because the aggravated felony ground of deportation lacked an exclusion counterpart. In fact, there is no indication that the Board even considered the comparable grounds issue. This is too slender a reed to support the view that the BIA endorsed a conduct-based approach, especially in the face of the substantial body of case law both before and after *Rodriguez-Cortes* squarely addressing the issue.

In short, Abebe is unable to point to any published BIA case granting § 212(c) relief to an alien because his conduct constituted a CIMT even though he was charged with some other ground of deportability. Nor can he point to any federal court of appeals precedent establishing a conduct-based test for comparability. To the contrary, the Ninth Circuit cases that have addressed the issue have come out the other way. *See Komarenko,* 35 F.3d at 435.

The comparable grounds test restated in *Blake* and *Brieva* is consistent with past administrative and judicial interpretations of the statute and does not represent a substantial unexplained shift in agency practice.

C. Equal Protection

It is well established that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution.

It is equally well established that the Due Process Clause incorporates the guarantees of equal protection. *Komarenko,* 35 F.3d at 434. This court applies the rational basis test to federal immigration statutes distinguishing among groups of aliens. *Tapia-Acuna,* 640 F.2d at 225.

Abebe argues that *Blake* creates classes of aliens who are treated differently without any rational justification. Specifically, he argues that because the conduct underlying his deportability – the sexual abuse of a minor offense – could render him excludable under the CIMT inadmissibility provision, principles of equal protection require that he be given the same statutory waiver opportunity that would exist for an alien being deported for a CIMT conviction. However, this court has already rejected a virtually identical claim in *Komarenko.* That case involved an alien who had been convicted of assault with a deadly weapon and was deportable under § 241(a)(2)(C) (firearms deportation ground). 35 F.3d at 434. Mr. Komarenko argued that the conduct underlying his conviction "could have rendered him excludable as an alien convicted of a [CIMT]" and that therefore his equal protection rights were violated when relief was denied on the basis of the comparable grounds test. *Id.* at 435. This court refused to "employ[ ] a factual approach" but instead examined the classes of persons created by the excludability and deportation provisions. *Id.*

Komarenko explicitly limited the constitutional holding in *Tapia-Acuna* to cases involving aliens

facing deportation on a basis which "*is identical to a statutory ground for exclusion* for which discretionary relief would be available." *Komarenko,* 35 F.3d at 434. *Tapia-Acuna* adopted the Second Circuit's *Francis* decision. *Francis* compared two classes of aliens. In one, an alien who became deportable, left the United States, returned, and was then deported *on a ground for which he could have been excluded upon his last re-entry,* would be eligible for § 212(c) relief under the *nunc pro tunc* procedure of *Matter of L-*. In the other class, an alien who became deportable but stayed in the United States would have no opportunity for relief. The *Francis* court perceived no rational basis for this distinction.

Abebe faces deportation for committing an aggravated felony/sexual abuse of a minor offense. Had he left the United States and returned after his conviction, he could not have been excluded on a "sexual abuse of a minor" theory because no such ground of inadmissibility exists. It is simply beside the point that the government *could have* sought to exclude him on the CIMT ground. All that *Francis* and *Tapia-Acuna* require is that the government give the same benefit (the waiver of a particular ground of inadmissibility) to aliens whether or not they depart the United States. *Komarenko* establishes that "the linchpin of the equal protection analysis in this context is that the [deportation and exclusion] provisions be substantially identical." 35 F.3d at 435. As noted above, the aggravated felony/sexual abuse of a minor ground under which Abebe was found deportable is

not substantially identical to the CIMT ground of exclusion. *Komarenko* therefore settles the issue.[12]

D. Due Process and Retroactivity

Abebe argues that *Blake* and *Brieva* represent new rules that may not be applied retroactively to upset the settled expectations of LPRs who became deportable under the old regime. Whether we apply the framework of analysis in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) or *Montgomery Ward & Co. v. FTC,* 691

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[12] Amici curiae argue that *Komarenko*'s analysis is no longer good law because it rested on the *Fleuti* doctrine, which allowed some LPRs to bypass the excludability provisions if they were returning from innocent, casual and brief trips abroad. *See* note 6, *supra.* According to amici, the *Komarenko* court's rejection of a conduct-based analysis was essentially prudential because the court did not wish to speculate as to whether Mr. Komarenko would have been deemed to be seeking entry if he took a hypothetical trip abroad following his assault conviction. Although creative, this argument is unconvincing. Neither *Komarenko,* nor the cases on which it relies – *Tapia-Acuna* and *Cabasug* – mention the *Fleuti* doctrine. Instead, *Komarenko* rejected the alien's framing of the question as whether he "*could have been* excluded under the moral turpitude provision" because doing so would require "extend[ing] discretionary review to every ground for deportation that could constitute . . . moral turpitude." 35 F.3d at 435. The absence of the *Fleuti* doctrine does not erase this concern. Further, amici simply assert that the *Fleuti* doctrine has been superseded by IIRIRA's amendments to the definition of "admission" in INA § 101(a)(13). Although the BIA agrees with this contention, *Matter of Collado-Munoz,* 21 I. & N. Dec. 1061, 1063-67 (BIA 1998), this court has not yet addressed the issue.

F.2d 1322 (9th Cir.1982), Abebe's argument fails for the simple reason that *Blake* and *Brieva* do not represent a change in the law. As discussed extensively *supra* in Section III.B.3, the BIA's published cases and this court's decisions considering the issue have consistently held § 212(c) relief to be unavailable to aliens deportable on grounds that lack comparable grounds of exclusion whether or not their conduct could also be characterized as involving moral turpitude. Since at least the 1970s an alien in Abebe's position would not have had any reasonable expectation of § 212(c) relief. There simply is no retroactivity problem because there is no new law. *Valere*, 473 F.3d at 761; *Vo*, 482 F.3d at 370.

IV. CONCLUSION

Provisions authorizing discretionary relief from exclusion have traveled a long way from their original textual and functional starting points. Because the constitution does not require us to go further afield, we decline to do so. To the extent it challenges the BIA's disallowance of former § 212(c) relief, Abebe's petition for review is denied. For the reasons stated in the separate memorandum disposition filed concurrently with this opinion we remand for further proceedings regarding the withholding of removal claim.

Petition DENIED in part, REMANDED in part.

BERZON, Circuit Judge, concurring:

I write separately because I would decide this case differently than does the majority were I not constrained by *Komarenko v. INS,* 35 F.3d 432 (9th Cir.1994). *Komarenko,* in my view, was wrongly decided, in large part for the reasons that the Second Circuit recently explained in a thorough analysis of the equal protection issue underlying this case. *See Blake v. Carbone,* 489 F.3d 88 (2d Cir.2007). But for *Komarenko,* I would decide this case as the Second Circuit decided *Blake.*[1] Yet, I cannot fault the majority for relying on *Komarenko* in its equal protection analysis, and I therefore concur in all but Part C of the majority opinion, and in the result – denying the petition.[2]

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[1] Incidentally, *Blake* reversed the very Board of Immigration Appeals ("BIA") precedential opinion to which the majority in this case defers. *See Matter of Blake,* 23 I. & N. Dec. 722 (BIA 2005).

[2] But for *Komarenko,* I might well consider deciding the statutory and regulatory issues as well differently than does the majority. Where there is a substantial constitutional issue – as there surely would be in this case but for *Komarenko* – there is no need to defer to agency decisions on statutory and regulatory issues that, if decided in favor of the party raising constitutional claims, would avoid the need to reach the constitutional issue raised. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). With *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) thus inapplicable, the statutory and regulatory issues we decide might very well come out differently than they do.

I.

As *Blake* explains, the equal protection analysis in *Francis v. INS,* 532 F.2d 268 (2d Cir.1976), adopted by this court in *Tapia-Acuna v. INS,* 640 F.2d 223 (9th Cir.1981), and by the BIA in *Matter of Silva,* 16 I. & N. Dec. 26 (BIA 1976), mandates an *offense*-specific solution rather than the *ground*-specific analysis that the BIA has adopted and that the majority opinion today upholds.[3] In other words, to solve the *Francis* problem, we should ask simply whether a deportable alien would also have been excludable for the *offense* that rendered him deportable, regardless of the statutory *ground* under which that offense falls.

As the majority quite correctly describes, however, *see ante,* at 1104-05, *Komarenko* held, to the contrary – viz., that for deportable aliens, the "linchpin" of § 212(c) availability is not the nature of the alien's offense but rather the similarity between the statutory text of a "ground" for exclusion and a "ground" for deportation. *See Komarenko,* 35 F.3d at 435. I fundamentally disagree with this approach, as did

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[3] I use the term "ground" to refer to the categories of offenses, e.g., aggravated felonies, that are listed by name in the Immigration and Nationality Act ("INA") as reasons to deport or exclude an alien. "Offenses" – the specific crimes that aliens commit or for which they are convicted – are not listed by name in the INA. Rather, "offenses" can make an alien deportable or excludable if the offenses fall under a *ground* of deportation or excludability.

the Second Circuit in *Blake*. Indeed, rather than fully addressing the equal protection problem identified in *Francis* and *Tapia-Acuna*, *Komarenko*'s ground-specific analysis simply creates new arbitrary distinctions between similarly situated aliens.

A.

We held in *Tapia-Acuna*, adopting the Second Circuit's analysis in *Francis*, that under the equal protection guarantee implicit in the due process clause of the Fifth Amendment, "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251(a)(11) [regarding drug offenses] whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability." 640 F.2d at 225. Our concern was that "[a]s noted in *Francis*, no purpose would be served by giving less consideration to the alien whose ties with this country are so strong that he has never departed after his initial entry than to the alien who may leave and return from time to time." *Id.* (quotation marks omitted).

The BIA had earlier acquiesced in *Francis*, except in the Ninth Circuit. *See Tapia-Acuna*, 640 F.2d at 224-25; *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). At that point, "the difficult task became one of implementation. How to decide whether a deportee was 'similarly situated' to an excludee?" *Blake*, 489 F.3d at 95. As the majority properly concludes, even before

Matter of Blake, the BIA "consistently held that relief is available only for aliens facing deportation on a ground with some tight connection to a ground of excludability that could have been waived under § 212(c) had the alien traveled abroad." *Ante* at 1099. In this circuit, *Komarenko* followed suit, as a matter of constitutional law.

Komarenko's constitutionally based analysis did, however, differ from the more practical analysis of the BIA. The BIA turned to a ground-specific approach because it was concerned that not all crimes that triggered deportability also triggered excludability. As a result, an offense-specific approach would produce the strange result of allowing some aliens with more severe criminal convictions access to relief not available to aliens convicted of less serious crimes. *See Matter of Wadud*, 19 I. & N. Dec. 182, 185 (BIA 1984); *cf. Cabasug v. INS*, 847 F.2d 1321, 1326-27 (9th Cir.1988) (rejecting a similar argument). The Attorney General additionally suggested that such an approach was necessary to stay as true to the text of § 212(c) as possible. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 287-88 (BIA 1990, AG 1991).

Komarenko, on the other hand, concluded that for crimes that fall under different grounds of deportation and exclusion, the distinction between a deportable alien who travels and one who does not is not arbitrary – even if both aliens would also be excludable and eligible for § 212(c) relief upon reentering the country. 35 F.3d at 435. *Komarenko* furthermore "decline[d] to speculate whether the

[Immigration and Nationality Service] would have applied [the crimes involving moral turpitude] excludability provision to an alien in Komarenko's position" due to concerns about the scope of the court's authority. *Id.* We reasoned that if we analyzed Komarenko's offense to determine whether it triggered excludability as well as deportability, we would have to review far more deportation orders in order to determine whether the offenses properly qualified as crimes involving moral turpitude. *Id.* "Such judicial legislating would vastly overstep 'our limited scope of judicial inquiry into immigration legislation,' and would interfere with the broad enforcement powers Congress has delegated to the Attorney General, *see* 8 U.S.C. § 1103(a)." *Id.* (citations omitted) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977)).[4]

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[4] To the extent that *Komarenko* is concerned with the propriety of the court's determination in the first instance of what constitutes a crime involving moral turpitude, it is at least arguable that *Komarenko* applies only to cases in which it is not clearly established that the alien's crime constitutes a crime involving moral turpitude, or some other excludable offense. I nevertheless concur in the majority opinion because I believe its reading of *Komarenko* as not so limited is the better one. In addition to discussing the proper role of this court, *Komarenko* rests on an equal protection analysis that holds distinctions among classes of aliens who have committed the same crime not arbitrary if based on differing statutory categories. 35 F.3d at 435. While I disagree with that holding, it is fully applicable here and sufficient to resolve the equal protection issue.

These analytical differences aside, however, the practical effects of the BIA's approach and this court's approach in *Komarenko* have been virtually the same: the comparable grounds standard has meant that § 212(c) relief is available only to aliens whose offenses fall under grounds of deportation that – as a matter of statutory text – are described with similar language as or largely overlap with categories of excludable offenses.

B.

As the Second Circuit explained, the BIA's – and our – "emphasis on similar language is strange" given the context, *Blake,* at 102:

> The touchstone in *Francis* was the irrelevant and fortuitous circumstance of traveling abroad recently; the decision did not consider whether equal protection requires that all or even most offenses falling under a particular ground of deportation must also fall under the counterpart ground of exclusion. In short, eligibility for relief in *Francis* turned on whether the lawful permanent resident's offense could trigger § 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation.

Id. at 102 (citations and quotation marks omitted). In other words, "what makes one alien similarly situated to another is his or her *act or offense,*" not the grounds the government chooses to use to deport the aliens. *Id.* at 104 (emphasis added). Accordingly, the

Second Circuit reached what in my view is the only permissible result after *Francis* and *Tapia-Acuna*: "[E]ach petitioner, a deportable lawful permanent resident with an aggravated felony conviction, is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion." *Id.* at 104. And this is the only permissible result even if one is not sure that *Francis* and *Tapia-Acuna* are analytically correct. *See Blake,* 489 F.3d at 104 ("*Francis* expanded the sweep of § 212(c); Congress's only response was to limit and then repeal the statute; and the task of reconciliation unfortunately fell on the BIA. While hindsight might pin much of this confusion on *Francis,* we are bound to finish what our predecessors started.").

Komarenko's alternative approach – based on grounds of deportation rather than offenses – is troublesome not only because it imperfectly solves the *Francis* problem, but also because it creates new problems. *Francis* and *Tapia-Acuna* identified as arbitrary – and thus unconstitutional – the distinction between deportable aliens who were alike except that one had left the United States temporarily and was trying to return, and the other had not. The comparable grounds test has made the availability of § 212(c) relief turn on an equally arbitrary distinction, between two groups of deportable aliens who would *both* have been excludable had they sought to return after leaving. Under this test, alien A who is deportable and excludable because he committed assault with a deadly weapon is not eligible for relief

from deportation because his offense falls into a category of deportable offenses – "aggravated felonies" – that is different from the relevant category of excludable offenses – crimes involving moral turpitude – even though he would, in fact, have been eligible for relief had he been intercepted at the border. *See Komarenko,* 35 F.3d at 435. On the other hand, alien B who is deportable because he committed a drug offense is eligible for relief simply because drug offenses were described with similar *words* in the deportation and exclusion statutes. *See Tapia-Acuna,* 640 F.2d at 224-25. No rational purpose can be served by this distinction. Although important policy considerations inform decisions about which *offenses* trigger deportability and excludability, the size, scope, and overlap of *categories* of deportable offenses and *categories* of excludable offenses reflect no rational judgment about which individuals deserve to stay in or enter the country. *See generally Blake,* at 102 n. 10 (noting that making § 212(c) relief depend on the "incidental overlap" between categories of excludable and deportable offenses "is exactly the sort of standard that invites arbitrary decision-making. How would the BIA determine how much overlap suffices? Would more than half the offenses underlying a ground of deportation have to fit within a particular ground of exclusion? Or would 33.333% do?").

Moreover, there is an additional anomaly that the *Blake* court did not mention: The comparable

grounds test is strangely at odds with how § 212(c) relief operates once it is granted.

The BIA has consistently held that when an alien receives a waiver of excludability under § 212(c) or other waiver provisions, that alien can no longer be excluded or deported solely due to the offense that made him excludable – even if there is a category of deportable crimes that applies to his offense and that is different from the category that permitted the waiver. *See Matter of Balderas,* 20 I. & N. Dec. 389, 392 (BIA 1991); *Matter of Gordon,* 20 I. & N. Dec. 52, 56 (BIA 1989); *Matter of Mascorro-Perales,* 12 I. & N. Dec. 228, 229-32 (BIA 1967); *Matter of G-A-,* 7 I. & N. Dec. 274, 275-76 (BIA 1956); *see generally Molina-Amezcua v. INS,* 6 F.3d 646, 647-48 (9th Cir.1993) (per curiam).[5] So, in other words, relief under § 212(c) is itself offense-specific, *not* ground-specific, and the BIA is thus entirely inconsistent in its application of ground-specific and offense-specific analysis.

The result of this anomaly is, once again, inexplicable distinctions in the treatment of similarly situated individuals: As between two individuals who would be deported for the same aggravated felony, alien C who had received a waiver at the border for that offense is insulated from deportation for the

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[5] By the same token, a § 212(c) waiver does not extend to later crimes committed by the same alien, even if they fall within the same category of offenses for which the alien received the earlier waiver. *See Balderas,* 20 I. & N. Dec. at 393.

offense on *any* ground, including on the aggravated felony ground that did not give rise to the waiver; alien D, who remained here, is deportable as an aggravated felon because of the categorical mismatch. In other words, the categorical approach is applied to one but not the other, resulting in an arbitrary distinction.

II.

There is an additional reason I would reconsider *Komarenko,* aside from the considerations that it cannot be reconciled with *Tapia-Acuna* and creates additional irrational classifications: Although the Supreme Court has not directly addressed the issue in this case, it has assumed a premise consistent only with the offense-specific approach of the Second Circuit.

INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) observed that "[t]he extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly." *Id.* at 295, 121 S.Ct. 2271. As an example of the crimes that could be waived under § 212(c), the Court cited a particularly large and growing category of deportable offenses: aggravated felonies. *Id.* at 295 & n. 4, 121 S.Ct. 2271. Yet, it is precisely this category of offenses that *Matter of Blake* and *Komarenko* are most likely to render unwaivable.

Aggravated felonies will most often fail the comparable grounds test. Although the category includes numerous crimes for which an arriving alien could be excluded, the term "aggravated felony" never appears as a ground for exclusion. Furthermore, the category of aggravated felonies, as well as the subcategories enumerated in the statute, *see* 8 U.S.C. 1101(a)(43), imprecisely overlap with the most similar category of excludable offenses: crimes involving moral turpitude. *See Blake,* 23 I. & N. Dec. at 727-28 & n. 3. *But see Matter of Meza,* 20 I. & N. Dec. 257, 259 (BIA 1991) (concluding that one set of aggravated felonies – drug trafficking crimes – satisfy the comparable grounds test because those crimes fell under a subset of aggravated felonies that was enumerated in statute and which would be mostly "encompassed within the scope of" a category of excludable offenses).[6]

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[6] This case involves an aggravated felony that is identified in the statute as a subcategory of aggravated felonies. 8 U.S.C. § 1101(a)(43)(A) (defining sexual abuse of a minor as an aggravated felony). There is no ground of excludability that is as narrowly defined as this subcategory of aggravated felonies. Furthermore, as the BIA noted, the subcategory of aggravated felonies that includes sexual abuse crimes includes offenses that could never serve as the basis for exclusion. *Blake,* 23 I. & N. Dec. at 727-28 & n. 3. Neither the majority opinion nor the BIA opinion has addressed the application of *Komarenko* and the comparable grounds test to situations in which the subcategory of aggravated felonies into which an alien's deportable offense falls is *entirely* subsumed by a category of excludable offenses.

As the Supreme Court observed six years ago, the availability of § 212(c) relief has had a profound impact on resident aliens who face deportation. *St. Cyr,* 533 U.S. at 295, 121 S.Ct. 2271. Despite its unavailability under current law, § 212(c) continues to provide a vital lifeline for qualifying aliens. In reducing the availability of § 212(c) relief, *Matter of Blake* severely, unnecessarily, and unconstitutionally distorts the law of § 212(c) as the executive branch has practiced it and as we – with the unfortunate exception of *Komarenko* – have interpreted it.

In short, were I not bound by *Komarenko,* I would adopt the Second Circuit's analysis in *Blake* and remand for consideration of whether Abebe is otherwise eligible and, if so, whether he should receive a grant of § 212(c) relief as a matter of discretion. Because *Komarenko* is the law of our circuit, I concur in the majority opinion except for Part C, and in the denial of the petition.

240 Fed. Appx. 198

2007 WL 2012363 (C.A. 9)

United States Court of Appeals,
Ninth Circuit.
Yewhalashet ABEBE,
Petitioner,
v.
Alberto R. GONZALES, Attorney General,
Respondent.
No. 05-76201.

Argued and Submitted Dec. 4, 2006.
Filed July 9, 2007.

Robert B. Jobe, Esq., Law Offices of Robert B. Jobe, San Francisco, CA, for Petitioner.

Ronald E. Lefevre, Chief Counsel, Office of the District Counsel, Department of Homeland Security, San Francisco, CA, District Counsel, Office of the District Chief Counsel U.S., Department of Homeland Security, Phoenix, AZ, John C. Cunningham, Esq., U.S. Department of Justice Civil Div./Office of Immigration Lit., Washington, DC, for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A26-810-941.

Before: D.W. NELSON, COWEN,* and BERZON, Circuit Judges.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

MEMORANDUM**

Petitioner Yewhalashet Abebe faces removal for a 1992 conviction involving the sexual abuse of a minor – an aggravated felony under Immigration and Nationality Act ("INA") § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A). He challenges the denial of former § 212(c) relief and an Immigration Judge's ("IJ") determination that he was convicted of a "particularly serious crime," rendering him ineligible for withholding of removal. INA § 241(b)(3)(B)(ii), 8 U.S.C. 1231(b)(3)(B)(ii). In a separate opinion filed concurrently with this memorandum, we deny the petition insofar as it challenges the denial of § 212(c) relief. In this memorandum, we remand to the BIA for a determination on the merits of the withholding of removal claim.

Abebe's notice of appeal to the BIA sufficiently raised the question of whether the IJ applied the correct legal standard in making the "particularly serious crime" determination. Because the Board refused to address this issue, we remand for an initial determination on the merits.

REMANDED.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

U.S. Department of Justice
Executive Office of
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration
Appeals

File: A26 810 941 – Florence Date: SEP 30 2005

In re: YEWHALASHET *ABEBE* a.k.a. Yewhala Eshet Abebe a.k.a. Yewhala Abebe

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Virginia A. Vasquez
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two of more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Waiver of Inadmissibility

ORDER:

PER CURIAM. We affirm the Immigration Judge's May 10, 2005, decision pretermitting the respondent's application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1988).

In 1992, the respondent was convicted in California of the offense of engaging in lewd and lascivious conduct with a child under 14 in violation of CAL. PENAL CODE § 288(a) – an aggravated felony under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A); to wit, "sexual abuse of a minor." *United States v. Baron-Medina,* 187 F.3d 1144 (9th Cir. 1999). The Immigration Judge determined, in accordance with this Board's precedent decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), that section 212(c) relief was unavailable to the respondent because the "sexual abuse of a minor" aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act. *See also* 8 C.F.R. § 1212.3(f)(5). We agree with the Immigration Judge.

On appeal, the respondent argues that the method of statutory construction applied by this Board in *Matter of Blake, supra,* violates his constitutional right to due process and equal protection of the laws. In this regard, we would simply note that the "statutory counterpart" approach to interpretation of former section 212(c) is well established in the jurisprudence of the United States Court of Appeals for the Ninth Circuit, which has consistently rejected the same constitutional arguments raised by the respondent in his present appeal. *Carr v. INS*, 86 F.3d 949, 951-52 (9th Cir. 1996) (quoting *Cabasug v. INS*, 847 F.2d 1321, 1327 (9th Cir. 1988)). We must emphasize that former section 212(c) of the Act did not pardon or waive crimes, *per se*, it waived *grounds*

of inadmissibility, some of which arose from crimes. *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Thus, for purposes of determining whether a ground of deportability has a statutory counterpart in the grounds of inadmissibility, it is not enough that the alien's particular offense could have constituted a valid factual predicate for a charge of inadmissibility. Instead, the applicant for section 212(c) relief must demonstrate with respect to the ground of deportability at issue in his case that Congress has employed similar language to describe substantially equivalent categories of offenses in the grounds of inadmissibility.

We do not agree with the respondent that Ninth Circuit law compels the conclusion that he is eligible to seek a section 212(c) waiver in this case. As we have noted, the "statutory counterpart" requirement of our case law is fully consistent with Ninth Circuit law. Furthermore, while the Ninth Circuit has issued a number of decisions indicating that section 212(c) relief remains available to some aliens with aggravated felony convictions, this conclusion is not necessarily inconsistent with this Board's decisions. *See Matter of Meza*, 20 I&N Dec. 257 (BIA 1991) (alien deportable under the "drug trafficking" aggravated felony category set forth at section 101(a)(43)(B) of the Act may seek section 212(c) relief because section 101(a)(43)(B) does have statutory counterpart in the grounds of inadmissibility at sections 212(a)(2)(A)(i)(II) and (C) of the Act). Moreover, in many other cases decided by the Ninth Circuit, such as *Cordes v.*

Gonzales, ___ F.3d ___, 2005 WL 2060851 (9th Cir. 2005) (referred to in the respondent's brief), the "statutory counterpart" issue was never addressed at the administrative level – and therefore was not presented on appeal before the Ninth Circuit – because the Immigration Judges and this Board had pretermitted the waiver applications on independent grounds pursuant to *Matter of Soriano*, 21 I&N Dec. 516, 533-40 (BIA 1996, A.G. 1997), *overruled by INS v. St. Cyr*, 533 U.S. 289 (2001).

In conclusion, we agree with the Immigration Judge that the respondent is not eligible to apply for a section 212(c) waiver. The respondent raises no appellate challenge to the Immigration Judge's decision pretermitting his applications for asylum and withholding of removal and denying his application for protection under the Convention Against Torture, and therefore those issues are not before us. The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FLORENCE, ARIZONA

File A 26 810 941 May 10, 2005

In the Matter of

YEWHALASHET ABEBE,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii), I&N Act – aggravated felony conviction under the definition in Section 101(a)(43)(A), law relating to sexual abuse of a minor

APPLICATION: Relief under the Convention Against Torture

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Virginia A. Vasquez, Esquire

DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 50-year old male native and citizen of Ethiopia who was placed in removal proceedings by the issuance of a Notice to Appear, dated February 3rd, 2005 *(See* Exhibit 1). At a master calendar hearing on March 2nd, 2005, the respondent submitted written pleadings *(See* Exhibit 2) denying all factual allegations and the charges of removal.

The Government submitted the documents to the Court to include a Form I-181, Memorandum of Creation of Record of Lawful Permanent Residence, and conviction documents (See Exhibit 3).

The Court found that all of the factual allegations on the Notice to Appear were sustained, that the charge for having been convicted of an aggravated felony was also sustained. The Court did not sustain the charge for having been convicted of two crimes involving moral turpitude.

The respondent designated Ethiopia as the country of removal and then indicated a fear of returning to Ethiopia.

There was an issue as to whether or not the respondent would be eligible for a 212(c) waiver because his conviction for lewd and lascivious conduct on a child under 14 years of age out in California was in July of 1992. However, the *Matter of Baker* decision by the BIA indicated that with such a conviction, 212(c) really would not be appropriate in this case.

Further, the respondent would not be eligible for asylum because he's been convicted of an aggravated felony.

The respondent initially did not want to apply for withholding and only wanted to apply for relief under the Convention Against Torture.

This Court made an assessment as to whether or not the respondent's crime was a particularly serious crime.

The respondent testified that even though he plead guilty to two counts of lewd and lascivious conduct with a child under 14, he said that he didn't do anything. This incident was on February 29, 1992. The respondent stated that he was alone in his apartment and an 8-year old girl, named Angela, came into the apartment. She, apparently, had come many times before to play with the children of the lady the respondent was living with. The respondent stated that she only stayed for about three minutes and he did absolutely nothing to her, but was arrested later that day for the lewd and lascivious conduct. The respondent stated that he was forced to plead guilty. That after his conviction and after he got out of jail he tried a couple of times to appeal his case, but was denied. He was required to register as a sex offender. He, apparently, failed to report to a probation officer at one point in time while he was on probation, was given an additional 90 days in jail, and, later, also was given 45 days in jail for a conviction for failure to register as a sex offender. He stated that he was supposed to re-register on his birthday and didn't do it.

The Court found that the respondent had plead guilty, and, therefore, had to consider that he was guilty of two counts of lewd and lascivious conduct with a child 8 years of age. The respondent does not take responsibility for those offenses, even though he plead guilty, and, to this day, denies doing anything to the 8-year old girl. In this Court's assessment, his denial of taking responsibility compounds the action

for which he was convicted, and the Court would find that this type of an offense on an 8-year old girl would be a particularly serious crime. Therefore, the Court finds that the respondent has been convicted of a particularly serious crime and, therefore, is not eligible for withholding of removal.

The only relief available to the respondent is relief under the Convention Against Torture.

The respondent testified that he's 50-years old, that he was born in Ethiopia, that he finished high school in Ethiopia, then worked as a radio technician. He is not married and has no children.

The respondent left Ethiopia in 1978 and went to East Germany on a scholarship to study how to build houses. After studying in East Germany for two years, he escaped and went to West Berlin. He was in West Berlin for about three years, worked building fences. In 1984, the respondent came to the United States as a refugee, and he, then, adjusted, became a lawful permanent resident.

The respondent has never been back to Ethiopia since he left in 1978. He does have three sisters who live in Ethiopia and he has kept in contact with his sisters by telephone, his last contact being in January of 2005.

The respondent states that if he had to return to Ethiopia he would have to live on his father's property, which he says is surrounded by members of the Oromos race, and that he, as a member of the

Amhara race, and the Oromos are blood enemies. He is afraid of what the Oromos might do to him.

The respondent stated that the race that's in power now in Ethiopia is the Tigre race. The Prime Minister is a member of the Tigre race.

The respondent stated that when he lived in Ethiopia the party in power was the Communists, but they were overthrown in 1992 after he left and went to Germany, and actually came to the United States. The respondent said he had no problems with the Government, but that he did not, when he was in East Germany, he felt that he had been blacklisted and he wanted to escape into West Berlin because he was afraid that he would remain on this blacklist and not be able to work in Ethiopia.

The respondent stated that he had no fears of the Tigre race or the party that's in power in Ethiopia today.

In order to establish eligibility for relief under the Convention Against Torture, the respondent must show that it is more likely than not that he would be tortured by the Government, or by someone with the acquiescence of the Government, or a public official.

Finding of the Court

There is no need to assess the credibility of the respondent as a witness because even believing everything that the respondent said in his application and in his testimony before this Court, he has not

established that it is more likely than not that he would be tortured by the Government, or by someone with the acquiescence of the Government, or a public official, in Ethiopia. The race that he fears, the Oromos, is not in power, and while the respondent states that he would have to live on his father's property because he wouldn't be able to get a job because of his glaucoma, there is absolutely no evidence or information that he would face torture at the hands of the Government or someone on behalf of the Government. He has no problems with the Government in Ethiopia. So, the Court will enter the following order.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum is denied because he is not eligible for asylum because of his aggravated felony conviction.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be denied because the Court found that he has been convicted of a particularly serious crime.

IT IS FURTHER ORDERED that the respondent's application for deferral of removal under Article 3 of the Convention Against Torture be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Ethiopia.

/s/ _____
SCOTT M. JEFFERIES
Immigration Judge

577 F.3d 1113

United States Court of Appeals,
Ninth Circuit.
Yewhalashet ABEBE, Petitioner,
v.
Eric H. HOLDER Jr., Attorney General, Respondent.
No. 05-76201.

Aug. 18, 2009.

Robert Bradford Jobe, Esquire, Law Offices of Robert B. Jobe, San Francisco, CA, for Petitioner.

Donald E. Keener, Esquire, Alison Drucker, Esquire, Saul Greenstein, Esquire, Trial, Jennifer Jeanette Keeney, Esquire, Senior Litigation Counsel, U.S. Department of Justice, Washington, DC, for Respondent.

Before: ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, ANDREW J. KLEINFELD, SIDNEY R. THOMAS, BARRY G. SILVERMAN, RONALD M. GOULD, RICHARD C. TALLMAN, RICHARD R. CLIFTON, CONSUELO M. CALLAHAN, CARLOS T. BEA and N. RANDY SMITH, Circuit Judges.

ORDER

The petition for en banc panel rehearing and the petition for full court rehearing en banc are denied. *See* Fed. R.App. P. 40; Fed. R.App. P. 35; Cir. R. 35-3.

BERZON, Circuit Judge, with whom PREGERSON, REINHARDT, THOMAS, WARDLAW,

WILLIAM A. FLETCHER, and PAEZ, Circuit Judges, join, dissenting from denial of full court rehearing:

The en banc majority opinion in this case reverses a thirty year old precedent; does so in answer to a question not raised or briefed by either party; comes to a conclusion in conflict with that of the Attorney General and the rule applied in every circuit, as well as in conflict with the necessary assumption of a Supreme Court case, *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); and in doing so distorts the fundamental premises of equal protection law. Moreover, there was no reason whatsoever to embark on this ill-fated adventure, as the concurrence joined by three members of the en banc court persuasively shows.

Although this court has never held a full court en banc, the partial court en banc process depends upon en banc panels sticking to issues appropriately before them and taking heed of the ramifications of their decisions for broad, unrelated areas of law. Here the bare panel majority did neither. If ever a case merited full court en banc consideration, this one did.

I. BACKGROUND

In his deportation proceeding, Abebe, a lawful permanent resident ("LPR"), argued that he was eligible for discretionary relief from deportation, invoking the now-repealed INA § 212(c), which provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily

. . . and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [(establishing classes of excludable aliens)]." Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (repealed 1996). Although § 212(c) by its terms applied only to LPRs in exclusion proceedings, "through a decades-long series of administrative and judicial decisions, the Attorney General's statutory authority to grant relief from *exclusion* has been interpreted to carry with it a similar authority to grant relief from *deportation* under certain circumstances." *Abebe v. Gonzales,* 493 F.3d 1092, 1095 (9th Cir.2007). And, under the Supreme Court's decision in *St. Cyr,* even though § 212(c) was repealed in 1996, relief remains available to aliens who pled guilty prior to the effective date of the repeal and who "would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326, 121 S.Ct. 2271.

The *Abebe* three-judge panel of which I was a member held that in Abebe's particular circumstances, a recent agency regulation validly precluded relief. *See* 8 C.F.R. § 1212.3(f)(5). I concurred on the ground that *Komarenko v. INS,* 35 F.3d 432 (9th Cir.1994), precluded the contrary conclusion, but urged en banc consideration of *Komarenko.* The court then decided to hear the case en banc, presumably to consider the continued viability of *Komarenko.*

I continue to believe that *Komarenko* was wrongly decided, as Judge Thomas's en banc dissent explains, and should be overruled. *Abebe v. Mukasey,* 554 F.3d 1203, 1217-1218 (9th Cir.2009) (Thomas, J., dissenting). For present purposes, however, the dispute over whether *Komarenko* was rightly or wrongly decided doesn't matter, because what the en banc court ultimately addressed was an entirely different question.[1] A six-judge majority of the en banc panel sidestepped the *Komarenko* question altogether and instead overruled a prior opinion, *Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir.1981), the validity of which *Komarenko* assumed. *See Abebe,* 554 F.3d at 1207. Yet, no party to the case had suggested this course, and there was no briefing on it.[2]

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[1] Judge Clifton's concurrence and Judge Thomas's dissent in the en banc panel decision set out the parameters of the *Komarenko* issue.

[2] The subject of *Tapia-Acuna*'s validity was discussed only briefly at oral argument. At approximately the thirty-five minute mark, Chief Judge Kozinski asked Respondent's counsel, "Is it correct to say that if *Tapia-Acuna were* overruled, if it weren't on the books, the *Komarenko* problem would drop out altogether?" Respondent's counsel answered, "I think that's right. I think that's right." When Judge Callahan asked Respondent's counsel to clarify his answer, he stated, "Well, certainly you don't need to overrule it. Arguably, you could clarify it and say that we think *Komarenko* was correctly decided, because *Komarenko* of course was based on the validity of *Tapia-Acuna,* so the Court I suppose could clarify *Tapia-Acuna* if it wished. But certainly it does not need to *overrule* [*Tapia-Acuna*]." Respondent's counsel never argued that *Tapia-Acuna should* be overruled.

Overruling *Tapia-Acuna* was not only a bolt from the blue, it was entirely unnecessary to the result the majority reached (as Judge Clifton's concurrence shows), and was based on a fundamental misunderstanding of *Tapia-Acuna*'s holding. Even more disturbing, the en banc majority's overruling of a nearly thirty-year-old precedent *does not resolve the equal protection issue before the three-judge panel and the en banc court in this case,* and, by pretending that it does, clashes resoundingly with Supreme Court and Ninth Circuit case law.

To illustrate this last, supervening problem: Imagine Abebe is in one courtroom in Immigration Court, and another LPR – let's call him Joe – is in a courtroom down the hall. Years earlier, both Abebe and Joe were convicted of the same crime in the same state court. The Department of Homeland Security (DHS) now wants to remove both of them on the basis of their state convictions. It charges Joe with deportability[3] on a ground that would also make him inadmissible (say, the ground of having been convicted of a crime involving moral turpitude), whereas it charges Abebe with deportability on a ground that would not make him inadmissible (say, the ground of having been convicted of an aggravated felony). Both Abebe and Joe seek to apply for relief from removal

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[3] Following the en banc majority's usage, *see Abebe*, 554 F.3d at 1205, n. 3, I use the terms "deportability" and "removability," and the terms "excludability" and "inadmissibility," interchangeably throughout this opinion.

under the former INA § 212(c). Following the "statutory counterpart" rule, codified at 8 C.F.R. § 1212.3(f)(5), the Immigration Judge (IJ) rules that Joe is eligible to apply for such relief because his charged ground has a statutory counterpart in inadmissibility. Following the same regulation, the IJ in Abebe's case, down the hall, rules that Abebe is not eligible to apply for relief and orders him removed.

Abebe then comes to us – as he in fact did – to complain that he's been denied equal protection of the laws, because the class of deportable LPRs to which he belongs – those who are charged with grounds of deportability that have no statutory counterpart in inadmissibility – is treated differently from another class of deportable LPRs – those charged with grounds of deportability that *would* make them inadmissible, even when both are being deported for committing the same offense. This classification is irrational, says Abebe, so the DHS has to treat me the same as it treated Joe.

What does the majority opinion say in response? Abebe, it says, you have no complaint, because *both* you and Joe should have been – or at least could have been – deported. DHS doesn't have to make § 212(c) relief available to *any* deportable aliens; we erred thirty years ago in *Tapia-Acuna* when we said that it did.

That answer both misapprehends and is wholly unresponsive to Abebe's equal protection claim. The core of equal protection law is classification, not

entitlement. That *neither* Abebe nor Joe may be *entitled* to apply for § 212(c) relief does not change the fact that the government applied a policy classifying Joe as eligible and Abebe as ineligible, and proposes to throw Abebe but not Joe out of this country. That policy either violates equal protection, or it doesn't. Overruling *Tapia-Acuna* does not tell us whether Abebe's constitutional right to equal protection was violated, it just distorts equal protection law.

II. TAPIA-ACUNA

Again, in overruling *Tapia-Acuna,* the en banc panel decided a question that was never briefed or argued by either party. The panel did not call for briefs on the question, and it was mentioned in oral argument only in passing. To decide a question that involves overruling a nearly thirty-year-old opinion of this Court – concurred in by the agency and consistent with the law of the only other circuit to have considered the question – without providing notice to the parties that such a question is in play and without soliciting their positions, is both unprecedented and inconsistent with the goal of informed decision-making toward which we strive.

The resulting opinion demonstrates that there is good reason why en banc panels – or any panels – don't usually destroy foundational decisions with no input from the parties. The en banc majority characterizes *Tapia-Acuna* as holding "that there's no rational basis for providing section 212(c) relief from

inadmissibility, but not deportation." *Abebe*, 554 F.3d at 1207. The majority suggests it was *Tapia-Acuna* and its Second Circuit counterpart, *Francis v. INS*, 532 F.2d 268 (2d Cir.1976), that forced the agency to extend § 212(c) relief to aliens in deportation proceedings in the first place. *Id.* at 1205.

Not so. In fact, the agency had been extending § 212(c) relief to aliens in deportation proceedings for decades *before Francis* and *Tapia-Acuna* were decided. In 1940, the Attorney General held that the Seventh Proviso of the 1917 Immigration Act permitted him to grant nunc pro tunc deportation waivers to LPRs who had traveled abroad and been readmitted, but who were subsequently placed in deportation proceedings because of a conviction that could have been the basis for an inadmissibility charge. *Matter of L-*, 1 I. & N. Dec. 1 (B.I.A.1940). Although the Immigration and Nationality Act of 1952 replaced the Seventh Proviso with the slightly differently worded INA § 212(c), the Attorney General held in 1955 that Congress intended § 212(c) relief to be available to LPRs in deportation proceedings, just as the Seventh Proviso had been. *Matter of S-*, 6 I. & N. Dec. 392 (BIA 1954).

Thus, by the time the Second Circuit decided *Francis* in 1976, it was settled agency interpretation that § 212(c) relief was available to certain LPRs in deportation proceedings – i.e., those who had traveled abroad after their conviction, were readmitted without being charged with inadmissibility, and were later placed in deportation proceedings. *Francis* did not

question the agency's statutory authorization to grant § 212(c) relief nunc pro tunc to LPRs in deportation proceedings. Instead, it held that, if the agency did so, the equal protection component of the Fifth Amendment required that relief also be available to LPRs who had *not* traveled abroad prior to being placed in deportation proceedings, ruling that there is no rational basis to discriminate between LPRs in deportation proceedings who had previously traveled abroad and LPRs in deportation proceedings who had not.

Later that same year, in *Matter of Silva,* 16 I. & N. Dec. 26 (BIA 1976), the BIA acquiesced in *Francis* in all circuits except ours, where contrary precedent was controlling. *See Arias-Uribe v. INS,* 466 F.2d 1198 (9th Cir.1972). Several years later, in *Tapia-Acuna,* we overruled *Arias-Uribe* and, following the Second Circuit's position in *Francis* and the BIA's acquiescing opinion in *Silva,* held that aliens in deportation proceedings who had traveled abroad and aliens in deportation proceedings who had not traveled abroad must be treated the same so long as they are otherwise similarly situated. In other words, *Tapia-Acuna* just brought us into line with the law as applied by the then-INS and in the all other circuits.

The majority, ignoring this evolution, provides a superficial explanation of why Congress might rationally have limited § 212(c) relief to admitted aliens: It might have wanted to "create an incentive for deportable aliens to leave the country[,]" because the relief available upon reentry would be broader

than that available in deportation proceedings, and thus, "[b]y encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens." *Abebe,* 554 F.3d at 1206. But *Tapia-Acuna* does not involve the comparison of (1) LPRs in deportation proceedings who are currently inside the country with (2) LPRs in exclusion proceedings who are currently at a port of entry and hoping to be readmitted, as the *Abebe* majority assumes. Rather, *Tapia-Acuna* involves the comparison of (3) LPRs in deportation proceedings who had previously departed and returned to the United States with (4) LPRs in deportation proceedings who have not left the United States since their conviction. As Judge Thomas's en banc dissent persuasively argues, the hypothetical cost-saving rationale that the majority suggests might have motivated Congress's differential treatment of aliens in classes (1) and (2) does not pass even the most lenient rational-basis scrutiny, when one recognizes that it is in fact aliens in classes (3) and (4) that *Tapia-Acuna* is comparing, both of whom are in *deportation* proceedings inside the United States, and both of whom the government has had to expend resources to apprehend. *Id.* at 1215-16 (Thomas, J., dissenting).

The upshot is that even if the en banc majority had been deciding a question properly before it, it decided it incorrectly. Moreover, the en banc majority was obliged to square its holding with the Supreme Court's decision in *St. Cyr,* which it does not do. *St.*

Cyr simply makes no sense if the majority opinion in this case is right.

In *St. Cyr,* the Supreme Court held that although Congress repealed § 212(c) when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, § 212(c) relief must remain available to LPRs whose plea agreements were entered before IIRIRA went into effect, because retroactive application of the amendment would 11226 impermissibly upset the reasonable reliance of aliens who pled guilty to crimes under the pre-IIRIRA regime. *St. Cyr,* 533 U.S. at 323-24, 121 S.Ct. 2271 (quoting *Landgraf v. USI Film Prod.,* 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Importantly for present purposes, the petitioner in *St. Cyr* was in deportation proceedings, not exclusion proceedings, *id.* at 293, 121 S.Ct. 2271, yet the Court did not consider that fact an obstacle to his eligibility to § 212(c) relief. Before reaching the merits of St. Cyr's retroactivity argument, the Supreme Court recounted the legislative history of § 212(c) and cited *Matter of Silva,* the BIA opinion in which the agency acquiesced in the very equal protection analysis that the en banc majority in this case has thrown overboard, for the understanding that § 212(c) relief was available:

> Like [the Seventh Proviso], § 212(c) was literally applicable only to exclusion proceedings, but it too has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with "a lawful unrelinquished domicile of seven

> consecutive years" to apply for a discretionary waiver from deportation. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976) (adopting position of *Francis v. INS*, 532 F.2d 268 (C.A.2 1976)).

St. Cyr, 533 U.S. at 295, 121 S.Ct. 2271. *St. Cyr* did not question this reading of § 212(c). Instead, it proceeded on the understanding that § 212(c) relief *was* available in both deportation and exclusion proceedings, necessarily assuming that, as *Silva* and *Francis* had ruled, there was no rational basis to distinguish between LPRs in deportation proceedings who had traveled abroad and those who had not.

The en banc majority's decision to overrule *Tapia-Acuna* (this Circuit's counterpart to *Francis v. INS*) and implicitly to invalidate the regulation allowing § 212(c) to be administered to LPRs in deportation proceedings thus undermines the first premise of *St. Cyr*. Indeed, the en banc majority in this case would seem to revive the very unfairness rectified in *St. Cyr* – namely, making deportable aliens who relied on the agency's practice with regard to granting waivers from deportation by pleading guilty to crimes from which they might have received waivers under § 212(c) relief under the applicable law at the time they pled. Now, those aliens are back in the same position, because the basis for granting them a waiver from deportation has been torn to shreds – with notice to no one – by the en banc majority in this case.

III. EQUAL PROTECTION

But – while bad enough – that's not the worst of what the en banc majority has done. It decides a question that not only was not raised, but that has nothing to do with settling the equal protection challenge that *was* raised.

The first step in an equal protection analysis is to determine what classification *has been applied* to the petitioner. As the forgoing discussion shows, Abebe's status as a deportable alien and his prior travel history are utterly beside the point in deciding whether he was denied equal protection of the law, as those two classifications had nothing to do with why the agency held him ineligible. Instead, the BIA held Abebe ineligible for § 212(c) relief because he fell on the wrong side of the agency's statutory counterpart rule. Under that rule, as between deportable aliens who have not left the United States, the agency will not remove those charged with removal based on a statutory ground that has an exclusion counterpart, but will remove those charged with a removable ground with no such counterpart – even if both committed the same crime.

We explained in *Servin-Espinoza v. Ashcroft,* 309 F.3d 1193 (9th Cir.2002), applying *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County,* 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), that when confronted with an equal protection challenge to an administrative policy, we must analyze the rationality of the classification the agency is

actually making and applying to the petitioner, not the rule the governing statute establishes, if the two are different. *Cf. Yick Wo v. Hopkins,* 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the [C]onstitution."); *McQueary v. Blodgett,* 924 F.2d 829, 835 (9th Cir.1991) ("To conclude that the relevant Washington sentencing law is evenhandedly *applicable* does not entirely dispose of the matter, however. The equal protection clause also requires that the law be even-handed *as actually applied.*") (emphases in original).

Servin-Espinoza involved "an equal protection challenge to an administrative policy that violated a statutory command." 309 F.3d at 1197.[4] The

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[4] Coincidentally, the administrative policy at issue in *Servin-Espinoza* was also related to the provision of § 212(c) relief. *Servin-Espinoza* addressed the narrow question whether the INS violated equal protection when it denied § 212(c) relief to deportees during the window of time between the BIA's decision in *In re Fuentes-Campos,* 21 I. & N. Dec. 905 (BIA 1997) (which held that AEDPA § 440(d), which barred § 212(c) relief, operated against LPRs in deportation proceedings but not those in exclusion proceedings) and our decision in *United States v. Estrada-Torres,* 179 F.3d 776 (9th Cir.1999) (which held that the BIA's interpretation in *Fuentes-Campos* was contrary to the meaning of the statute). I do not cite *Servin-Espinoza* for its substantive § 212(c) holding, however, or even for its proposition

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government argued that, because the governing *statute* created a classification that was supportable on rational basis review and that would have rendered the petitioner ineligible for the benefit he sought, no equal protection violation had occurred. *Id.* at 1196. *Servin-Espinoza* held that the rationality of the statute's classification was beside the point, because it was not the statute's classification that had been applied to the petitioner to deny him the benefit, but rather a different classification fashioned by administrative policy. Following the Supreme Court's analysis in *Allegheny Pittsburgh,* which similarly considered an equal protection challenge to a tax assessment policy that violated a state tax law, *see* 488 U.S. at 346, 109 S.Ct. 633, *Servin-Espinoza* directed its equal protection inquiry at the classification the agency had *actually* applied to the petitioner.[5]

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that a more demanding variant of rational basis review might apply to an administrative policy in violation of a statutory command. Rather, I cite it only for the manner in which it went about identifying the relevant classification to which equal protection analysis had to be applied.

[5] That is not to say, of course, that an alien who is simply denied a benefit for a reason that is in violation of statutory authority necessarily has an equal protection claim. What we have here is an agency policy formally enunciated and consistently and long-applied, approved in BIA case law and embodied in a formally promulgated regulation. *See Servin-Espinoza,* 309 F.3d at 1198 (noting that the INS policy was a proper focus for equal protection analysis because it "systematically favored excludables over deportables. This difference in treatment was not isolated or sporadic [but] . . . based on a policy formally announced . . . [by the BIA] and consistently followed [by the

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Applying that common-sense understanding here clarifies where the en banc majority went fundamentally wrong. Abebe's argument is that the agency's application of its statutory counterpart rule violated his equal protection rights. He does not complain of the statute's apparent classification of LPRs in exclusion proceedings as eligible and those in deportation proceedings as ineligible (a classification the agency has ignored for decades). Nor does he complain of the agency's former rule that deportees were eligible for § 212(c) waivers only if they had previously traveled abroad (a rule invalidated by *Francis* and *Tapia-Acuna,* and renounced by the agency in *Matter of Silva*). And no wonder – neither of these rules was applied to him. Thus, the en banc majority's overruling of *Tapia-Acuna* does nothing to resolve Abebe's equal protection challenge one way or the other, because the classification *Tapia-Acuna* held to be invalid was simply not the distinction applied to Abebe to make him ineligible for relief.

Put another way, what the majority's approach misses is that the core of the equal protection right is "the denial of equal treatment resulting from the

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agency]. . . .") (citation omitted); *compare Chan v. Reno,* 113 F.3d 1068, 1074 (9th Cir.1997) (rejecting equal protection challenge based on the allegation that the INS treated another alien more favorably than the petitioner because "[a]ny other conclusion would create an absurd result: whenever the INS granted an alien relief to which he was not entitled, any future attempts to apply the law correctly would generate an equal protection claim.").

imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier. . . ." *Id.*; *see also Turner v. Fouche,* 396 U.S. 346, 362, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) ("We may assume that the [plaintiffs] have no right to be appointed to the . . . board of education. But [they] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications"). Whether Abebe was *entitled* to § 212(c) relief as a person in deportation rather than exclusion proceedings is thus entirely irrelevant to his core equal protection challenge.

Once we have isolated the proper focus of the equal protection analysis, it becomes clear that there is no avoiding the *Komarenko* question. Either there is a rational basis for the statutory counterpart classification – the classification actually applied – or there is not.

Perhaps recognizing that overruling *Tapia-Acuna* doesn't get it where it needs to go, the en banc opinion attempts to obviate the need for an equal protection analysis altogether, by stating that "[u]nder its plain language, section 212(c) gives the Attorney

General discretion to grant lawful permanent residents relief only from *inadmissibility* – not deportation." *Abebe,* 554 F.3d at 1205. It then reasons that "[s]ince petitioner was not eligible for section 212(c) relief in the first place, the BIA could not have committed an equal protection violation by denying him such relief." *Id.* at 1207.

That leap is simply wrong, as should be apparent by now. Again, equal protection law is concerned with *equal treatment,* not with entitlement. If a governmental agency misinterpreted a statute to require that all schoolchildren be given $5.00 – or if a court mistakenly held that the Constitution required that all schoolchildren be given $5.00 – but the agency then gave the $5.00 only to white children, not to blacks or Asians, it would be no answer to the equal protection claim by black or Asian children that neither they nor the white children were entitled to the $5.00 in the first place. Similarly, if, as here, there is a regularly applied, official administrative policy conferring eligibility for § 212(c) relief on one group of deportees but not another, that policy is not exempt from the equal protection clause's strictures because the agency misconstrued the statute, or because the equal protection analysis that generated the agency's approach to applying the statute was wrong. Either way, the on-the-ground result was based on a second-level classification, which was the one *actually applied* to Abebe, and which either is or is not an irrational classification of similarly situated LPRs. The lack of entitlement might become relevant

at the remedy stage, but it is not relevant at the violation stage.[6]

Pertinent to any remedy stage is the majority's suggestion that its decision might prompt the agency "to reconsider [8 C.F.R. § 1212.3(f)(5)], and eventually repeal it," thus ceasing to offer § 212(c) waivers to all deportees. *Id.* There are two problems with this suggestion as a solution to the *real* equal protection problem raised here, both of which stem from the fact that providing § 212(c) relief to deportees is long-established agency policy.

First, as *Servin-Espinoza* explained, again relying on the Supreme Court's holding in *Allegheny Pittsburgh,* an agency's perfectly proper change of policy going forward does not in any way mitigate a past equal protection violation, or provide a remedy for it. *See Servin-Espinoza,* 309 F.3d at 1199 ("In this case, as in *Allegheny Pittsburgh,* the proper remedy under the equal protection guarantee is to provide equality of treatment. Because we cannot turn back

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[6] The majority later maintains that, plain language notwithstanding, "[t]he INS may certainly choose to treat different classes of aliens the same, even though the statute does not." *Abebe,* 554 F.3d at 1207. That is not right either, as an agency has the discretion to act only within the boundaries allowed by its governing statute. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). If providing relief to deportees is foreclosed by the plain language of the statute, the agency may not elect to do otherwise. It could, however, be required to do so as a matter of constitutional mandate – which is exactly what happened in *Francis.*

the hands of time and erase the favorable treatment of excludable aliens, the only feasible way to remedy the discrimination suffered by Servin-Espinoza is to grant him the same opportunity to apply for § 212(c) relief that was systematically granted to [similarly situated] excludable aliens. . . ."). So, if the majority had decided that *Komarenko* erroneously approved an impermissibly irrational classification, the only proper relief would have been to direct the agency not to deport Abebe and allow him the opportunity to apply for § 212(c) relief.

Second, if the agency takes up the majority's invitation and precludes relief in the future to all deportees, we could have a second *St. Cyr* on our hands. *St. Cyr* held that a legislative change – the passage of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), repealing the former § 212(c) – could not apply retroactively to deny relief to LPRs who entered guilty pleas prior to IIRIRA's passage, because such retroactive application would "clearly attach[ ] a new disability[ ] in respect to transactions or considerations already past." 533 U.S. at 321, 121 S.Ct. 2271 (internal quotation omitted). *St. Cyr* thus mandated that § 212(c) relief remain available for LPRs who entered guilty pleas, just as it was available prior to IIRIRA and/or AEDPA. On *St. Cyr*'s logic, a repeal of the agency's longstanding policy making relief available to deportees would quite possibly fare no better on a retroactivity analysis, at least as applied to those who were convicted via guilty plea (as was Abebe).

And what if the agency declines the invitation, and continues to apply the statutory counterpart rule and the corresponding regulation as it is currently written? If that happens, we will have to decide the viability of *Komarenko* all over again, because the en banc majority opinion has not decided whether the statutory counterpart rule *actually applied* and embodied in 8 C.F.R. § 1212.3(f)(5) complies with equal protection.

So, all in all, the majority opinion not only fails to resolve the case before it, but also fails to set an intelligible rule for future cases. Worst of all, the majority opinion makes a hash of equal protection law generally for the future, by allowing courts to consider what the government's classification policy *should be,* rather than what it *is,* when addressing an equal protection claim.

The bottom line is that there is simply no escaping the *Komarenko* question. If the en banc panel was determined to deny Abebe's petition for review, it should have done so by upholding the statutory counterpart rule, affirming *Komarenko* without questioning the validity of *Tapia-Acuna,* as the concurrence would have done.

IV. CONCLUSION

Among the ultimate goals of the en banc process are ensuring the coherence of our case law, its consistency with Supreme Court law, and, when possible, its agreement with that of the other circuits. With its

overruling of *Tapia-Acuna* and its implicit invalidation of a federal regulation, the en banc majority in *Abebe v. Mukasey* has advanced none of these goals. Instead, it has casually overturned nearly thirty years of our own case law and an even longer period of settled agency interpretation, throwing future agency practice into uncertainty. It has created a conflict with the only other circuit court to have considered the question directly, *see Francis,* 532 F.2d 268, with the law actually applied by the agency and by every other circuit, and with the underpinnings of the Supreme Court's decision in *St. Cyr.* More broadly, the distorted analysis of Abebe's equal protection claim threatens our most basic understandings of equal protection law, with ramifications for cases in entirely different substantive areas.

For all these reasons, I respectfully dissent from the decision not to reconsider this indefensible opinion in a full court en banc.